

Exhibit 1
Attachment 1

INFORMATION BRIDGE

**Greenidge Multi-Pollutant Control Project****Description/Abstract**

The Greenidge Multi-Pollutant Control Project was conducted as part of the U.S. Department of Energy's Power Plant Improvement Initiative to demonstrate an innovative combination of air pollution control technologies that can cost-effectively reduce emissions of SO₂, NO_x, Hg, acid gases (SO₃, HCl, and HF), and particulate matter from smaller coal-fired electric generating units (EGUs). There are about 400 units in the United States with capacities of 50-300 MW that currently are not equipped with selective catalytic reduction (SCR), flue gas desulfurization (FGD), or mercury control systems. Many of these units, which collectively represent more than 55 GW of installed capacity, are difficult to retrofit for deep emission reductions because of space constraints and unfavorable economies of scale, making them increasingly vulnerable to retirement or fuel switching in the face of progressively more stringent environmental regulations. The Greenidge Project sought to confirm the commercial readiness of an emissions control system that is specifically designed to meet the environmental compliance requirements of these smaller coal-fired EGUs by offering a combination of deep emission reductions, low capital costs, small space requirements, applicability to high-sulfur coals, mechanical simplicity, and operational flexibility. The multi-pollutant control system includes a NO_xOUT CASCADE^{reg_sign} hybrid selective non-catalytic reduction (SNCR)/in-duct SCR system for NO_x control and a Turbosorp^{reg_sign} circulating fluidized bed dry scrubbing system (with a new baghouse) for SO₂, SO₃, HCl, HF, and particulate matter control. Mercury removal is provided as a co-benefit of the in-duct SCR, dry scrubber, and baghouse, and by injection of activated carbon upstream of the scrubber, if required. The multi-pollutant control system was installed and tested on the 107-MW_e, 1953-vintage AES Greenidge Unit 4 by a team including CONSOL Energy Inc. as prime contractor, AES Greenidge LLC as host site owner, and Babcock Power Environmental Inc. as engineering, procurement, and construction contractor. About 44% of the funding for the project was provided by the U.S. Department of Energy, through its National Energy Technology Laboratory, and the remaining 56% was provided by AES Greenidge. Project goals included reducing high-load NO_x emissions to ≤ 0.10 lb/mmBtu; reducing SO₂, SO₃, HCl, and HF emissions by at least 95%; and reducing Hg emissions by at least 90% while the unit fired 2-4% sulfur eastern U.S. bituminous coal and co-fired up to 10% biomass. This report details the final results from the project. The multi-pollutant control system was constructed in 2006, with a total plant cost of \$349/kW and a footprint of 0.4 acre - both substantially less than would have been required to retrofit AES Greenidge Unit 4 with a conventional SCR and wet scrubber. Start-up of the multi-pollutant control system was completed in March 2007, and the performance of the system was then evaluated over an approximately 18-month period of commercial operation. Guarantee tests conducted in March-June 2007 demonstrated attainment of all of the emission reduction goals listed above. Additional tests completed throughout the performance evaluation period showed 96% SO₂ removal, 98% mercury removal (with no activated carbon injection), 95% SO₃ removal, and 97% HCl removal during longer-term operation. Greater than 95% SO₂ removal efficiency was observed even when the unit fired high-sulfur coals containing up to 4.8 lb SO₂/mmBtu. Particulate matter emissions were reduced by more than 98% relative to the emission rate observed prior to installation of the technology. The performance of the hybrid SNCR/SCR system was affected by problems with large particle ash, ammonia slip, and nonideal combustion characteristics, and high-load NO_x emissions averaged 0.14 lb/mmBtu during long-term operation. Nevertheless, the system has reduced the unit's overall NO_x emissions by 52% on a lb/mmBtu basis. The commercial viability of the multi-pollutant control system was demonstrated at AES Greenidge Unit 4. The system, which remains in service after the conclusion of the project, has enabled the unit to satisfy its permit requirements while continuing to operate profitably. As a result of the success at

AES Greenidge Unit 4, three additional deployments of the Turbosorp{reg_sign} technology had been announced by the end of the project.

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ATTACHMENT 2



AES AEE2, LLC
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September 17, 2010

VIA HAND DELIVERY

Hon. Jaclyn A. Brillling
Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Notice of Protective Lay-Up of Greenidge Unit 4,
Torrey, Yates County, New York

Dear Secretary Brillling:

AEE2, LLC ("AEE2"), a wholly owned subsidiary of AES Eastern Energy, L.P., is the owner of, and AES Greenidge, LLC, a wholly owned subsidiary of AEE2, LLC, is the operator of, the Greenidge Unit 4 generating facility located in the town of Torrey in Yates County, New York. In its order adopting generator retirement notice requirements, the New York Public Service Commission ("Commission") noted that it had established in its initiating order that, for purposes of the Generator Retirement Notice Proceeding, the term "retirement" collectively included, *inter alia*, "mothballing, and other circumstances where a generating unit is taken out of service for a substantial period of time, excluding scheduled maintenance and forced outages."¹ Pursuant to the Generator Retirement Notice Order and the broad definition of the term "retirement" set forth therein limited to application thereto, AEE2 hereby provides this written notice that, in light of the market conditions and other circumstances as they are known as of this time, it intends to put its Greenidge Unit 4 facility in protective lay-up on Friday, March 18, 2010.

The Greenidge Unit 4 facility is a 108 MW net, coal & biomass-fired generating facility that provides energy, capacity and ancillary services in Central New York. The Greenidge Unit 3 facility also is owned by AEE2, was operated by AES Greenidge and is located on the same site. It was permanently retired on December 31, 2009. No other generating facilities are located on this site.

¹ See NYPSC Case 05-E-0889, Proceeding on Motion of the Commission To Establish Policies and Procedures Regarding Generation Unit Retirements, "Order Adopting Notice Requirements for Generation Unit Retirements" (issued and effective December 20, 2005) (hereinafter, "Generator Retirement Notice Proceeding" and "Generator Retirement Notice Order," respectively) at 1, n.1.



Since AEE2 purchased the Greenidge Unit 4 facility, more than \$40 million has been invested in environmental retrofits, including an SCR, a Dry Scrubber, and a Baghouse, to limit its emissions. In addition, \$9 million was invested to provide for biomass co-firing of up to 10% at the facility to lower its overall carbon levels. The combination of this significant investment in state-of-the-art technology coupled with the biomass conversion make AES Greenidge one of the cleanest coal fired units in the Northeast with respective removal rates of 95% for SO₂ and NO_x, and more than 99% for mercury.

Moreover, it has invested substantial additional dollars in the facility to improve its heat rate, reduce its outages and otherwise improve its operating capability. With respect to reliability, during the past 10 years, the facility has achieved a 90.1% availability factor. The site employs 40 direct employees, is one of the largest taxpayers in Yates County paying millions of dollars in property and other taxes annually and provides significant economic benefits and indirect employment benefits to the Yates County area.

However, based on the current and forecasted wholesale electric prices in Central New York and current and pending environmental regulations, the Greenidge Unit 4 facility is, and will continue to be, operating at a net loss. Thus, given that the unit is not economic at this time, AEE2 intends to put the Greenidge Unit 4 facility in protective lay-up to limit the costs that are incurred at the facility. AEE2 further intends to take all steps within its control to avoid permanently shutting down the facility by, e.g., continuing to explore any and all alternatives with its suppliers and other parties, including reductions in its variable and fixed costs. In that vein, during this six month period and any subsequent protective lay-up period that may ensue thereafter, AEE2 will direct AES Greenidge to perform associated maintenance and inspection work to keep the source in New York State's emissions inventory and maintain its environmental permits while closely monitoring market conditions and circumstances that will allow it to continue -- or to reinstate -- service from its Greenidge Unit 4 facility.

In accordance with the requirements that are set forth in the Generator Retirement Notice Order and Technical Bulletin No. 185 issued by the New York Independent System Operator, Inc. ("NYISO"), AEE2 contemporaneously has sent a copy of this protective lay-up notice to the NYISO via e-mail directed to its designated web address. In addition to providing a copy of this notice to the NYISO, the Generator Retirement Notice Order further provided that the notice must be provided to "any affected T&D utility" without, however, defining such term or otherwise providing guidance on how it was to be applied. The Greenidge Unit 4 facility is located in the service territory, and interconnected to the transmission and distribution system, of New York State Electric and Gas Corporation ("NYSEG"). While transmission and distribution studies of the local and bulk systems in the vicinity of the Greenidge Unit 4 facility have not yet been conducted,² AEE2 has provided a copy of this notice to NYSEG.

² In its Generator Retirement Notice Order, the Commission established that it had adopted the 180 day notice period for facilities sized equal to or greater than 80 MW with which AEE2 herein complies because it "equat[e] to the minimum period that NYISO indicates as adequate to identify and resolve reliability concerns." (See Generator Retirement Notice Order at 15.)



Kindly date-stamp the copy of this notice provided herein and return it to our messenger. Should you have any questions about this notice, please call or email me using the contact information noted above.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter S. Norgéot", written over a horizontal line.

Peter S. Norgéot
President, AES AEE2, LLC

cc: New York Independent System Operator at generator_retirement@nyiso.com (via e-mail and Overnight mail)
Mr. Jeffrey McKinney, New York State Electric & Gas Corp. (via e-mail and Overnight mail)

ALB 1,359,271v1 9-13-10

**In the Matter of Atlas Holdings LLC Application
for a New Source Review/ Prevention of Significant
Deterioration Inapplicability Determination for the
Greenidge Generating Station**

STATE OF NEW YORK)
COUNTY OF BROOME) SS:

Peter S. Norgeot, being duly sworn, deposes and states that:

1. I am currently the President of Global Power Advisors, LLC, ("Global Power") a power industry consulting company, with offices located at 998 Taft Avenue, Endicott, NY 13760. Among other things, Global Power specializes in providing consulting services on project development, engineering, procurement, construction, commissioning and commercial operations and maintenance in various power technologies in the energy industry.

2. Global Power is currently engaged by Atlas Holdings LLC to provide consulting services related to the restart of the Greenidge Generating Station ("Greenidge Generating Station" or "the Facility").

3. I graduated from the Massachusetts Maritime Academy in 1987 with a Bachelor of Science degree in Marine Engineering.

4. I was employed by AES Corporation in various engineering and management capacities from 1987 until January 1, 2013. Among the positions I held were the following: Vice President of Generation – North America East Group, President and Plant Manager of AES Shady Point Power Station, President, Plant Manager and Construction Manager of AES Ironwood Power Station, President, Plant Manager and Construction Manager of AES Barry Power Station, Start-Up Manager and Control Room Leader of AES Medway Power Station.

5. In April 2006, I was appointed by the Board of Directors of AES Corporation to the position of President of AES NY, LLC, the general partner of AES Eastern Energy, LP, AES Somerset, LLC, AES Cayuga, LLC, AEE2, LLC, AES Westover, LLC and AES Greenidge, LLC, and served in that capacity until December 28, 2012. AES Greenidge, LLC was the operating company for the Greenidge Generating Station.

6. I understand that a New Source Review/Prevention of Significant Deterioration Inapplicability Determination for the restart of the Greenidge Generating Station is being sought, and I have reviewed a copy of the final draft letter prepared by Frank V. Bifera, dated March 12, 2013 which requests such Inapplicability Determination. I make this affidavit for the purpose of providing a factual background regarding the events described in Mr. Bifera's letter.

7. I make this affidavit based primarily upon my own personal knowledge, as the former President of AEE2, LLC, AES Eastern Energy LP and AES Greenidge LLC, concerning the Greenidge Generating Station located in the Town of Torrey, New York.

8. AEE2, LLC owned the Westover Generating Station and the Greenidge Generating Station.

9. The Greenidge Generating Station was considered the "gem" of the AEE2, LLC fleet, since it had installed over \$38 million worth of environmental control technology upgrades under the United States Department of Energy Clean Coal Technology Program in 2006-2007, and was one of the cleanest coal-fired generating facilities in the Northeast.

10. As President of AEE2, LLC, AES Eastern Energy LP and AES Greenidge, LLC, I was familiar with, and had a working knowledge of, the competitive market position, daily operations, environmental compliance, maintenance and overall economic and financial position of the Greenidge Generating Station.

11. During 2010, the power prices in the New York power market trended downward, coinciding with rising coal prices and falling North America natural gas prices. In addition, the NYISO moved forward with the addition of a new capacity zone to its market, which market congestion put further downward pressure on the capacity prices paid to the power plants. These factors were projected to result in significant reductions in margin, increased costs and forecasted operating losses. As a result of these economic conditions, I directed that the Westover and Greenidge Generating Stations be put into Protective Lay-up to reduce and continue to limit the operating costs incurred at the Facility.

12. Upon information and belief, it was the intent of AES Greenidge, LLC to place the Facility into protective lay-up on a temporary basis and take steps to reduce costs and restart the Greenidge Generating Station when economic and market conditions improved.

13. Throughout the protective lay-up period, I continued to oversee AES Greenidge, LLC and directed several employees and contractors to maintain the Greenidge Generating Station so that it could be quickly reactivated in the event that the Facility's competitive market position changed.

14. During the protective lay-up period, AES Greenidge, LLC continued to employ the Maintenance Manager, and a former Operations Manager along with several other contractors to continuously maintain the Greenidge Generating Station so that it could be restarted in a timely manner.

15. On December 30, 2011, AEE2, LLC, AES Greenidge LLC and AES Eastern Energy LP (along with other debtor entities) filed for bankruptcy protection and I was asked by the President of North America - Generation to continue in my position as President. During this time, I worked closely with AES Eastern Energy, LP Board of Directors, the debtor entities' financial and legal advisors, the Creditor's Committee and the US Bankruptcy Trustee. Throughout the bankruptcy proceeding, while I remained in my position as President, I directed the employees and contractors employed by AES Greenidge, LLC to continue to maintain the Facility in Protective Lay-up so that it could be restarted if

economic conditions improved. These activities continued up until the sale of the Greenidge Generating Station on December 28, 2012.

16. During the entire time that AES Greenidge, LLC owned the Greenidge Generating Station after it was put into protective lay-up, it was maintained in a protective lay-up condition and it remained ready to be restarted in a relatively short period of time.

17. GMMM LLC did not at any time communicate to me what its business plan was for the Greenidge Generating Station, including whether the Facility would be demolished.

18. The November 28, 2012 letter from AEE2 to the New York State Department of Environmental Conservation requesting that the Title IV and Title V permits be terminated was drafted by AEE2's bankruptcy counsel, and, at the recommendation of counsel, signed by me as President of AEE2.

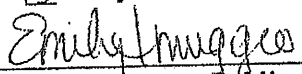
19. The December 18, 2012 Stipulation and Order to Terminate Consent Decree, was negotiated by AEE2's bankruptcy counsel, and, at the recommendation of counsel, signed by me as President of AEE2.

20. The grounds for my information and the basis of my belief are derived from carrying out my responsibilities as President of AES Greenidge, LLC and my personal observations at the Greenidge Generating Station during the time I held such position.


Peter S. Norgeot

Subscribed and sworn to before me

this 13th day of March, 2013.


Notary Public

EMILY TESTA MUGGEO
Lic. #01TE6198097
Notary Public-State of New York
Qualified in Broome County
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ATTACHMENT 4

Exhibit 1
Attachment 4



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DRESDEN



AES future is still uncertain

DRESDEN—The future of the AES Greenidge coal fired power plant in Dresden is still up in the air. In September 2010, the company filed the necessary paperwork with the New York State Public Service Commission to cease operations effective in March 2011. The company says AES operations are not profitable. AES officials stated they are looking at cost-cutting measures for the Dresden plant and are also assessing the viability of electric power in the region. On Monday, Jan. 31, AES Plant Manager Doug Roll added the company is in discussion with New York State Electric and Gas (NYSEG) about AES operating for a short duration past the proposed March closing date. AES AEE2, LLC, President Peter S. Norgeot said the site is staffed by 40 direct employees, and "is one of the largest taxpayers in Yates County." He added the company wants to avoid permanently shutting the facility down, but for now needs to close the plant to limit costs. Also last fall, AES filed the paperwork to close the plant in Dresden, the company also filed to close another plant in Broome County. Just like in Dresden, Norgeot said this plant in the town of Union was operating at a net loss. AES Greenidge burns coal and biomass to create energy in Dresden. According to the company's filing last September, since AEE2 purchased the facility, more than \$40 million has been invested in the plant. Norgeot added another \$9 million was invested to convert some operations into biomass burning. Up to 10 percent of the energy produced is from burning wood and wood by products. He explained despite all these investments, the plant is still losing money.

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Greenidge plant goes dark in Torrey

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The AES Greenidge power plant located near Dresden went dark on March 18 when it was taken out of service in steps approved by the New York State Public Service Commission, NYSEG and the New York Independent System Operator (NYISO).

On Monday, Plant Manager Doug Roll said workers are taking steps to prepare the equipment inside the plant to sit idle for as long as two years. Draining fluids, and protecting machinery from corrosion, the intent is to keep the plant in shape to generate power in the future, should the electricity market change.

A document submitted by AES in September notified the PSC, "In light of the market conditions and other circumstances as they are known as of this time, it (AES) intends to put its Greenidge Unit 4 facility in protective lay-up on Friday, March 18."

Roll says the plant is not competitive because of the high cost of coal, and the low cost of natural gas. In addition, the demand for electricity is low.

"The unfortunate thing is, it's one of the cleanest plants in the Northeast," said Roll.

AES says it has invested more than \$40 million in environmental retrofits to limit emissions from the plant and \$9 million was invested to allow the use of biomass (wood).

The plant had most recently employed about 40 employees.

Roll says the plant has been operating at a loss, and efforts will continue to find ways to reduce the fixed costs associated with operating the plant.

The company will keep all air and water discharge permits up to date, and the ash disposal pile will continue to operate, accepting ash from other AES facilities as approved by the New York State Department of Environmental Conservation.

In 2002, an extensive study of the feasibility of operating a bioethanol facility on the location was completed by a Virginia consulting firm.

According to that report, the AES Greenidge coal-fired power plant was originally constructed in the 1930's with its first generator (Unit 1) going into service in 1938. Additional units were added in 1942 (Unit 2), 1950 (Unit 3), and 1953 (Unit 4). Units 1 and 2 were retired from service in 1985. Unit 3 was retired in December 2009.

Roll says co-locating a bioethanol facility on the AES property would require a "tremendous amount of capital."

He said such an operation would be economically feasible according to the report, but it is not something that AES would do.

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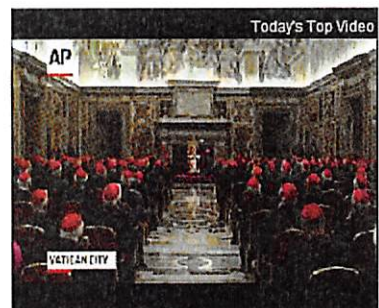
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Dresden power plant's future is up in the air

GABRIELLE PLUCKNETTE / Finger Lakes Times - Thirty-eight

Posted: Wednesday, October 6, 2010 12:00 am | Updated: 10:48 am, Mon Feb 7, 2011.

by AMANDA FOLTS/afolts@flltimes.com | 1 comment

DRESDEN — AES Greenridge may shut down its coal-fired power plant for an unspecified period of time unless the market improves, costs are cut or continued operation is determined necessary for reliability.

The state will first have to complete a review process.

On Sept. 17, the company submitted a document to the state Public Service Commission asking to put the plant into a long-term protective lay-up. Plant Manager Doug Roll cited a combination of increased costs for coal and rail transportation, high state taxes, fees, decreased demand for electricity and a decline in the price of natural gas.



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Roll said.

He said the moves the company is making don't necessarily mean the plant will shut down after six months. The current market forecast indicates that it will be extremely difficult, but if the company can continue to lower its costs, Roll said it may mean the plant can continue operating.

"Company officials really won't make the kind of decisions about shutting down the plant until it's evaluated the success of the cost-cutting initiatives and what the general market conditions are and the outcome of all of our initiatives that we're taking with things like payroll, expenses, property taxes and all those things," Roll said.

He said the plant has an outstanding operating history, with over \$50 million spent on environmental upgrades, part of a federal Department of Energy clean coal project. It also recently installed a biomass conversion project.

"It's one of the cleanest coal-fired plants in the entire northeast," he said.

The Dresden plant is part of AES Corporation, a global power company, headquartered in Arlington, Va.

The market forecast right now has the plant not running for the next couple years, he said, but the projection is that it could reopen in two to three years. He also noted the market forecasts are volatile and things could change.

"During the six-month period we'll be continuing to look at the forecasts one to two years out. So, that's the revenue side. But on the cost side we're looking at everything we can try to lower costs so we can bring the two closer together. So, it still could mean that we could still continue to run if the markets come up a little bit and our costs come down significantly. And then of course the third thing is if the plant is needed for reliability," he said.

The Dresden plant employs 38 people.

A shutdown could include some seasonal operations or situations where a core group remains on the job while others work only when the plant is running.

"A lot of these plans are still being formulated because we really need to find out what the results of the reliability studies are before we go down that road," Roll said.

It's a difficult uncertain time for employees, and everyone is aware of the situation, Roll said. But he said the

"All of those factors have basically made it such that we are not competitive, and the market forecasts show that, at least in the next couple years ... we cannot be competitive enough, and we won't be able to continue running," Roll said.

He said long-term protective lay-up status means the company would take steps to put the plant out of service for an extended period of time but protect equipment and systems so it could restart it if market conditions improve.

Submitting the notice started a six-month review process. The New York Independent System Operator, which Roll said controls the power in the state, along with NYSEG and the public service commission, will evaluate the impact of a shutdown on the reliability of the grid and the local transmission and distribution system.

In the meantime, the company is looking at its cost structure and working on initiatives to reduce costs,

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AARP Taxaide Program

Email: genevataxaide@gmail.com

Needed: Volunteers to help low- and middle-income clients prepare state and federal tax returns. Free training is provided. Email the above address for further information.

American Red Cross

Phone: (585) 241-4491

Website: www.redcross.org/ny/rochester/

Needed: Volunteers are needed to help bolster the Red Cross' overall numbers.

Bone Builders

Phone: Kim Bumpus, 665-0131, ext. 170

Email: kimberly.bumpus@waynecap.org

Website: www.waynecap.org

Needed: Volunteer leaders for Bone Builders, an osteoporosis prevention exercise program in Wayne County, with hopes of expanding into Ontario and Seneca counties. Leaders must be 55 or older and live in Wayne, Ontario or Seneca counties.

Geneva Center of Concern/Geneva Food Pantry

Phone: Cheryl Toor, 789-1117

Email: genevacoc@gmail.com

Facebook: www.facebook.com/pages/Geneva-Center-of-Concern/239266049466239

Needed: Volunteers to sort donated items, work the front desk, stock pantry shelves and work with clients in need of food. Volunteers also needed for bread pickup at local grocers on a once-a-week basis.

Geneva Community Lunch Program

Phone: Connie Sullivan, 521-6684

Email: csullivan@dor.org

Website: www.dor.org

Needed: Volunteers to assist with food prep, setting up the dining room, serving and cleanup; to assist with picking up food donations from local businesses; and to help receive and process donations from businesses and farmers. Meals are served from 11:45 a.m. to 12:15 p.m. weekdays, including holidays that fall on weekdays, at the First United Methodist Church

In the next couple weeks, company officials will meet with representatives from the public service commission as they try to understand the process in moving forward.

If the plant is needed for reliability, then the steps taken would be to get into a contract — called a reliability contract — for a duration of time with the local utility.

Mark Valerio is the president of Local 240 of the International Brotherhood of Electrical Workers, the union that represents hourly employees at Greenidge.

He acknowledged that his union has been in negotiations with Greenidge leaders for what he called "cost-cutting measures," but he said he didn't want to comment on specifics out of respect for union members.

Valerio said he had not received any notice of the plant closing and would get written notice if it shuts down.

Steve Griffin, CEO of the Finger Lakes Economic Development Center, said the company makes a payment in lieu of taxes agreement and would have a huge impact on the area if it shuts down.

Griffin said Greenidge isn't the largest local employer, but it offers well-paying jobs and has a stable employment base.

"The energy market is what it is. There's obviously nothing we can do from an economic development standpoint to impact that," Griffin said, adding that the company is doing all it can to keep the plant open.

He also said company officials have been talking to local municipalities and the economic development center to let them know where things stand.

The Dresden plant

History: Built in the 1930s, the plant was owned by New York State Electric and Gas until 1999 when it was sold to AES, part of the deregulation of the electric industry in New York.

Headquarters: AES Greenidge is part of AES Eastern Energy, the group of plants sold by NYSEG in New York, which is a subsidiary of AES Corp. headquartered in Arlington, Va.

Employees: 38.

Assessed value: \$50 million and is part of a PILOT agreement with the Finger Lakes Economic Development Center.

Location: Dresden, Yates County, about 15 miles south of Geneva on the western shore of Seneca Lake.

More about the plant

Upgrades: Over time, Plant Manager Doug Roll said, there were four generating units at the plant, one built in the late 1930s and one in the early 1940s, both of which have been retired and removed. Another unit, of 56 megawatts, was built in the late 1940s, and another unit was built in 1953 of 106 megawatts. The 56 megawatt unit was retired at the end of 2009, leaving just the 106 megawatt unit. That unit, Roll said, has state-of-the-art environmental controls. He noted that NYSEG spent a lot of money on the unit over the years to maintain its reliability. Roll said over \$50 million has been spent on environmental upgrades as part of a federal Department of Energy clean coal project. It also recently undertook a biomass conversion project.

Capacity: About 68 percent this year, which Roll explained doesn't mean the plant was off 32 percent of the time but that it wasn't at full load 100 percent of the time.

Geneva General Hospital

Phone: Christen Smith, 787-4065

Email: christen.smith@fhehealth.org

Needed: A substitute volunteer to deliver mobile meals occasionally to residents living within 2.8 miles of the hospital.

Geneva Public Library

Phone: Theresa Osborne, 789-5303

Email: tosborne@pls-net.org

Needed: Volunteers willing to help keep the library's shelves in order, saving library staff hours that could be used for serving the public.

Habitat for Humanity of Ontario County

Email: [Pat.Metting, drpamaud@yahoo.com](mailto:Pat.Metting@drpamaud@yahoo.com)

Website: www.hfhoc.org

Selection committee: A background in teaching, law or finance is a plus.

High Falls Film Festival

Email: Contact@HighFallsFilmFestival.com

Website: <http://highfallsfilmfestival.com/get-involved>

Needed: Volunteers are needed in several areas for the 11th annual event scheduled for April 18-20.

House of John in Clifton Springs

Phone: Carole or Danese, 462-5646

Email: house@houseofjohn.org

Website: www.houseofjohn.org

Needed: Volunteers needed to provide a wide variety of tasks, including end-of-life resident care and family support. This very rewarding work requires no special skills, only the desire to help and the completion of a short training course. Trainees learn at their own pace and are mentored by our dedicated staff and experienced volunteers in this beautiful home filled with life, love and activity. Flexible schedule.

Humane Society of Yates County

Phone: 536-6094

Website: www.yateshumane.org

Facebook: <http://www.facebook.com/profile.php?id=100003229426981&ref=ts#/pages/Humane-Society-of-Yates-County/58871338860>

Needed: Volunteers can do anything from playing with the animals to socializing them, training the dogs, cleaning cages, walking dogs, grooming, doing laundry, helping with fundraising, manning the desk or

Staff writer Sean McCracken contributed to this story.

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- Officials say NRW teacher died of hypothermia

Keuka Comfort Care Home

Phone: Anne Kiefer, 536-1690

Website: keukacomfortcarehome.org

Needed: Volunteers to provide end-of-life care to residents in an environment of hope and compassion. No prior health care experience necessary. Comprehensive training and flexible schedules. Daytime, evening and weekend volunteer shifts available.

Meals on Wheels (Northern Seneca County)

Phone: Sarah Rowe, 568-9436

Email: Sarah.Rowe@redcross.org

Needed: Volunteers to deliver hot food to seniors from 10:15 a.m. to 12:30 p.m. weekdays. Deliver a regular route once a week or be part of an on-call substitute list. Individuals and couples are welcome, as are businesses or groups willing to rotate employees or members each week. All delivery routes start and end in Waterloo.

Meals on Wheels (Wayne County)

Phone: Sue Buckley, 946-5623

Email: SBuckley@co.wayne.ny.us

Needed: Volunteers to deliver hot food to seniors weekdays, excluding holidays. Meals for Newark and Lyons are prepared by the Wayne County Nursing Home. Meals are picked up at the Nursing Home and delivered by local volunteers. Key Industries in Newark prepares and drops off meals in the other communities in the county, including Clyde, Macedon, Marion, North Rose, Ontario, Palmyra, Sodus, Williamson and Wolcott. Meals are then delivered by local volunteers in those communities.

Montezuma National Wildlife Refuge

Family Nature Club Lead Family

Phone: Tasha Daniels, 568-5987, ext. 229

Email: Tasha_Daniels@fws.gov

Needed: A creative, nature-loving or nature-curious family to act as the lead family for the Montezuma Family Nature Club. That family will develop and lead nature-inspired activities once a month, initially training with Park Ranger Tasha Daniels to brainstorm.






Visitor Center Host/The Lodge Nature Store Clerk

Phone: Andrea VanBeusichem, 568-5987, ext. 228

Email: Andrea_VanBeusichem@fws.gov

Needed: Volunteers willing to work once a month or 1-2 times a week. Specifically, weekend volunteers are needed. The center and store shifts are 10 a.m. to 3

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knowledge of birds and wildlife is helpful, but not necessary. Training is provided. The center and store are slated to open for the year March 16, weather permitting.

Newark-Wayne Community Hospital & DeMay Living Center

Listing No. 1

Phone: Marie Burnham, 332-2273

Email: marie.burnham@rochestergeneral.org

Website: www.rochestergeneral.org/about-us/newark-wayne-community-hospital/volunteering/

Needed: Volunteers are needed in a wide variety of areas, such as working in the Mulberry and DeMay gift shops; assisting staff in the Emergency Department; transporting specimens from the blood draw station to the lab in a tote-on-wheels; working with our chaplain tending to the spiritual needs of patients and residents; escorting participants on outings; and working in the Snack Bar. Written application and medical clearance are required. Training is provided.

Listing No. 2

Phone: Kim Bumpus, 665-0131, ext. 170

Email: kimberly.bumpus@waynecap.org

Website: www.waynecap.org

Needed: The Retired & Senior Volunteer Program seeks volunteers to help out at the hospital and living center. To participate in the RSVP program, volunteers must be 55 or older.

Ontario ARC

Phone: Donna Auria, (585) 919-2191

Email: dauria@ontarioarc.org

Website: www.ontarioarc.org/volunteer

Needed: Volunteers and college interns to assist in its various programs located throughout Ontario County. Some of the volunteer and college internship opportunities include: sharing talents like photography, sewing, crocheting or greeting-card making in one of the agency's day programs; assisting individuals who live in Ontario ARC's residences located in Bloomfield, Canandaigua, Farmington, Geneva, Phelps, Stanley and Victor; working with Recreation Services at its various events; and internship experiences in various departments like information technology and human resources.

Ontario County Office for the Aging Meal Delivery

Phone: Tarah Shedenhelm, 781-1321 or (585) 396-4040

Website: www.co.ontario.ny.us/Aging

Geneva, Canandaigua, Bloomfield and Victor. Volunteers pick up coolers at meal sites or Office for the Aging's Nutrition Kitchen and return them to the same place after delivery. Hours are roughly 11 a.m. to 1 p.m., depending on the length of the route. Training is provided and mileage reimbursement given upon request.

ProAction Yates Office for the Aging

Phone: 536-5515

Website: www.proactioninc.org/

Needed: Volunteers to make friendly phone calls, sometimes lasting up to an hour, to homebound seniors. The goal: provide support and enhance social contact. Background checks are required. Schedule is flexible, and volunteers may even be able to work from home.

Real Christmas

Phone: Charlotte Carroll, 539-8242; Bonnie Hosford, 539-9240

Needed: Volunteers to begin planning Waterloo's 2013 Real Christmas celebration. The next Real Christmas Committee meeting is scheduled for 6:30 p.m. March 19 at the Lyons National Bank branch on Route 414.

Retired & Senior Volunteer Program

Phone: Kim Bumpus, 665-0131, ext. 170

Email: kimberly.bumpus@waynecap.org

Website: www.waynecap.org

Living Healthy Workshops: Volunteers to become peer leaders and help people self-manage their chronic health conditions.

Wayne County meal delivery: Volunteers to deliver meals to homebound Wayne County citizens. Shifts last about an hour, and the delivery commitment can be as little as one day a month. Volunteers must be 55 or older.

Tax counseling/greeting: With new IRS guidelines in place, more volunteers 55 and older are needed to assist seniors with their tax returns. Time commitment is one or two afternoons per week.

Transportation corps: Drivers to help senior citizens in Ontario, Seneca and Wayne counties get to and from medical appointments. Drivers must be 55 or older. A modest mileage reimbursement and training are provided.

Job search/self-sufficiency: Volunteers to help veterans in Wayne County with essential job-search tasks, to obtain employment and to achieve self-sufficiency. Volunteers must be 55 or older.

Seneca County House of Concern

Email: hocseneca@gmail.com

Website: www.houseofconcern.org

Needed: Volunteer opportunities are available for a variety of jobs, including the processing of donations, general store help and pantry volunteers. Training is provided.

Seneca County Workforce Development

Phone: LeeAnn Haust, 539-1884

Email: lhaust@co.seneca.ny.us

Website: www.co.seneca.ny.us/workforceyouthbureau.php

Facebook: www.facebook.com/pages/Seneca-County-Workforce-Development-Youth-Bureau/247396165290206

Needed: People to staff the Volunteer Income Tax Assistance site. Free instruction, training and certification materials needed to prepare basic income-tax returns are provided.

Wayne CAP Foster Grandparent Program

Phone: Laurie Ten Eyck, 665-0131, ext. 190

Email: laurie.teneyck@waynecap.org

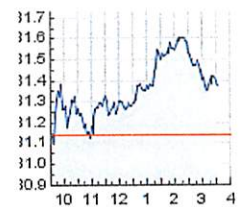
Website: www.waynecap.org

Needed: Foster grandparent volunteers at least 55 years old living in Canandaigua, Lyons and Marion. In return, foster grandparents receive a tax-free stipend, travel reimbursement and other benefits. The Wayne County Action Program-sponsored initiative is funded by The Corporation for National Service and the New York state Office for the Aging.

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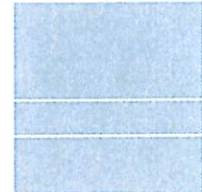


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Greenidge plant goes dark in Torrey

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Mar. 24, 2011 8:18 am

The AES Greenidge power plant located near Dresden went dark on March 18 when it was taken out of service in steps approved by the New York State Public Service Commission, NYSEG and the New York Independent System Operator (NYISO).

On Monday, Plant Manager Doug Roll said workers are taking steps to prepare the equipment inside the plant to sit idle for as long as two years. Draining fluids, and protecting machinery from corrosion, the intent is to keep the plant in shape to generate power in the future, should the electricity market change.

A document submitted by AES in September notified the PSC, "In light of the market conditions and other circumstances as they are known as of this time, it (AES) intends to put its Greenidge Unit 4 facility in protective lay-up on Friday, March 18."

Roll says the plant is not competitive because of the high cost of coal, and the low cost of natural gas. In addition, the demand for electricity is low.

"The unfortunate thing is, it's one of the cleanest plants in the Northeast," said Roll.

AES says it has invested more than \$40 million in environmental retrofits to limit emissions from the plant and \$9 million was invested to allow the use of biomass (wood).

The plant had most recently employed about 40 employees.

Roll says the plant has been operating at a loss, and efforts will continue to find ways to reduce the fixed costs associated with operating the plant.

The company will keep all air and water discharge permits up to date, and the ash disposal pile will continue to operate, accepting ash from other AES facilities as approved by the New York State Department of Environmental Conservation.

In 2002, an extensive study of the feasibility of operating a bioethanol facility on the location was completed by a Virginia consulting firm.

According to that report, the AES Greenidge coal-fired power plant was originally constructed in the 1930's with its first generator (Unit 1) going into service in 1938. Additional units were added in 1942 (Unit 2), 1950 (Unit 3), and 1953 (Unit 4). Units 1 and 2 were retired from service in 1985. Unit 3 was retired in December 2009.

Roll says co-locating a bioethanol facility on the AES property would require a "tremendous amount of capital."

He said such an operation would be economically feasible according to the report, but it is not something that AES would do.

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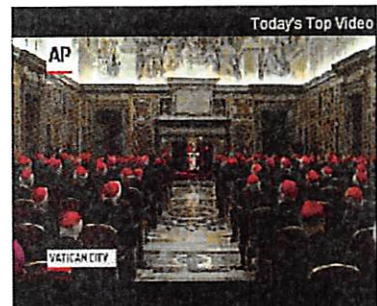
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2/28 6:30 PM Auditions for The Music Man Jr.

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Exhibit 1
Attachment 5

400 TPM 77PM

ID	Task Name	Duration	Start	Finish	Predecessor
1	Shutdown - March 18, 2011	0 days	Sat 3/19/11	Sat 3/19/11	
2	Schedule 6 Days in Advance with NYSEG - Switching Order	1 day	Mon 3/14/11	Mon 3/14/11	
3	Run Biomass Storage Bin KB-2 & Metering Bin Empty	1 day	Sat 3/19/11	Sat 3/19/11	
4	Close coal gates and burn feeders out	1 day	Sat 3/19/11	Sat 3/19/11	
5	Blow Sootblowers, to Clean up Furnace and Back pass	1 day	Sat 3/19/11	Sat 3/19/11	
6	Low Water Cut-off Test	1 day	Sat 3/19/11	Sat 3/19/11	
7	Conduct EBOP Test	1 day	Sat 3/19/11	Sat 3/19/11	
8	B4-72 OPEN - UNIT OFFLINE	1 day	Sat 3/19/11	Sat 3/19/11	
9	Run all Turbine Tests	1 day	Sat 3/19/11	Sat 3/19/11	
10	Unit on turning gear	5 days	Mon 3/21/11	Fri 3/25/11	8
11	Turbine Metal temps 500 deg or below, off turning gear oil pumps remain on	0 days	Fri 3/25/11	Fri 3/25/11	10
12	LOTTO	0 days	Sat 3/19/11	Sat 3/19/11	
13	Lockout and Tagout Activities after shutdown	4 days	Mon 3/21/11	Thu 3/24/11	8
14	Boiler	0 days	Thu 3/24/11	Thu 3/24/11	13
15	Deslag and lance boiler and vacuum all the ductwork-including the windbox	4 days	Fri 3/25/11	Wed 3/30/11	14
16	Drain all the water side	1 day	Fri 3/25/11	Fri 3/25/11	14
17	N2 on all pressure parts	5 days	Fri 3/25/11	Thu 3/31/11	14
18	Build a block wall on the exit gas duct after the air heater	10 days	Fri 3/25/11	Thu 4/7/11	14
19	Air heaters	0 days	Thu 3/24/11	Thu 3/24/11	14
20	Wash airheaters and cleanup aftermath-le FD etc	10 days	Thu 3/31/11	Wed 4/13/11	15
21	Run WWTP on Air Heater wash	15 days	Thu 4/14/11	Wed 5/4/11	20
22	Drain the piping from the tanks and all the piping in the plant	3 days	Wed 3/30/11	Wed 3/30/11	15
23	Isolate the tanks	15 days	Thu 3/31/11	Wed 4/20/11	22
24	Pull all the 16 ignitors and put in storage	5 days	Thu 4/21/11	Mon 4/25/11	23
25	Urea Storage	0 days	Tue 4/26/11	Mon 5/2/11	24
26	Drain the system totally-including the storage tanks	3 days	Mon 4/25/11	Thu 4/28/11	26
27	Flush the system with water & treat	5 days	Tue 4/28/11	Thu 5/5/11	27
28	Catalyst	0 days	Fri 4/29/11	Wed 3/30/11	15
29	Vacuum	5 days	Wed 3/30/11	Wed 4/6/11	29
30	Activated Carbon Injection system	0 days	Wed 4/6/11	Wed 4/6/11	30
31	Vacuum silo and rotor roller conveying system	15 days	Thu 4/7/11	Wed 4/27/11	31
32	Sootblower System	0 days	Thu 3/24/11	Thu 3/24/11	14
33	Drain entire system	2 days	Fri 3/25/11	Mon 3/28/11	33
34	Ash Removal Systems	0 days	Thu 3/24/11	Thu 3/24/11	14
35	Vacuum out hoppers and rotor roller all piping	5 days	Thu 4/7/11	Wed 4/13/11	30
36	Turbosorp	0 days	Wed 4/13/11	Wed 4/13/11	36
37	Lime Injection system	0 days	Wed 4/13/11	Wed 4/13/11	37
38	empty the three storage silos	10 days	Thu 4/14/11	Wed 4/27/11	38
39	open up the silo baghouses and clean the bags off	3 days	Thu 4/28/11	Mon 5/2/11	39
40	rotor roller the various conveyance piping	5 days	Tue 5/3/11	Mon 5/9/11	40
41	put heat inside blower cabinets	5 days	Thu 4/14/11	Wed 4/20/11	38
42	clean out all the internals on the airlocks	10 days	Thu 4/14/11	Wed 4/27/11	38
43	H2O Injection system	0 days	Wed 4/13/11	Wed 4/13/11	37
44	build an enclosure around the motors and heat	5 days	Thu 4/14/11	Wed 4/20/11	44
45	drain piping system and storage tank - pull out the lance/nozzle and store	3 days	Thu 4/21/11	Mon 4/25/11	45
46	Hydrator	0 days	Wed 4/13/11	Wed 4/13/11	37

ID	Task Name	Duration	Start	Finish	Predecessor
93	drain storage tank	2 days	Fri 3/25/11	Mon 3/28/11	93
94	remove trays on shutdown and clean and leave out	5 days	Tue 3/29/11	Mon 4/4/11	94
95	Condensate Pumps	0 days	Thu 3/24/11	Thu 3/24/11	13
96	cover motors and heat	5 days	Fri 3/25/11	Thu 3/31/11	96
97	drain out condensate well	5 days	Fri 4/1/11	Thu 4/7/11	97
98	LP Heaters	0 days	Thu 3/24/11	Thu 3/24/11	13
99	add N2 blanket	3 days	Fri 3/25/11	Tue 3/29/11	14
100	Hotwell	0 days	Thu 3/24/11	Thu 3/24/11	13
101	Turbine/Generator	2 days	Fri 3/25/11	Mon 3/28/11	101
102	drain	0 days	Fri 3/25/11	Fri 3/25/11	11
103	Rotor	0 days	Fri 3/25/11	Fri 3/25/11	103
104	rotate xxx times per year per OEM-reed lube oil system in service	1 day	Mon 3/28/11	Mon 3/28/11	104
105	Turning Gear	1 day	Mon 3/28/11	Mon 3/28/11	104
106	keep operable-run once per week	1 day	Mon 3/28/11	Mon 3/28/11	104
107	Lube Oil	0 days	Fri 3/25/11	Fri 3/25/11	103
108	lube oil system - leave in TOR-run turboloc for a period of time prior to rotor turn.	1 day	Mon 3/28/11	Mon 3/28/11	108
109	Run all oil pumps on a regular interval	1 day	Mon 3/28/11	Mon 3/28/11	108
110	Generator	0 days	Fri 3/25/11	Fri 3/25/11	103
111	Degass Generator and shut down iron horse	5 days	Mon 3/28/11	Fri 4/1/11	111
112	4A and 4B GSU	0 days	Fri 3/25/11	Fri 3/25/11	103
113	monitor oil levels and oil sampling-make sure N2 gas stays on	1 day	Mon 3/28/11	Mon 3/28/11	113
114	Exciter/Spare Exciters	0 days	Fri 3/25/11	Fri 3/25/11	103
115	coverup and put heat in it	5 days	Mon 3/28/11	Fri 4/1/11	115
116	Miscellaneous Electrical	0 days	Fri 3/25/11	Fri 3/25/11	11
117	Diesel Generator	0 days	Thu 3/24/11	Thu 3/24/11	13
118	Keep in good running Order	0 days	Thu 3/24/11	Thu 3/24/11	118
119	GSUs	0 days	Thu 3/24/11	Thu 3/24/11	119
120	monitor oil levels and oil sampling-make sure N2 gas stays on	2 days	Fri 3/25/11	Mon 3/28/11	120
121	Circuit Breakers and associated switchgear	0 days	Mon 3/28/11	Mon 3/28/11	121
122	rack out and cover	2 days	Tue 3/29/11	Wed 3/30/11	122
123	SSTs	0 days	Wed 3/30/11	Wed 3/30/11	123
124	monitor oil levels and oil sampling-make sure N2 gas stays on	2 days	Thu 3/31/11	Fri 4/1/11	124
125	MCCs	0 days	Fri 4/1/11	Fri 4/1/11	125
126	cover with plastic	5 days	Mon 4/4/11	Fri 4/8/11	126
127	Aux Transformers	0 days	Fri 4/8/11	Fri 4/8/11	127
128	cover and heat	5 days	Mon 4/11/11	Fri 4/15/11	128
129	DC Backup/Batteries	0 days	Fri 4/15/11	Fri 4/15/11	129
130	required by JA to maintain and test and monitor	5 days	Mon 4/18/11	Fri 4/22/11	130
131	Joint Use Equipment	0 days	Fri 4/22/11	Fri 4/22/11	131
132	required by JA to maintain batteries and heating/lighting and power in SWBD	3 days	Mon 4/25/11	Wed 4/27/11	132
133	Lighting	0 days	Wed 4/27/11	Wed 4/27/11	133
134	go to minimum-just enough to walk around safely	1 day	Thu 4/28/11	Thu 4/28/11	134
135	PA System	0 days	Thu 4/28/11	Thu 4/28/11	135
136	keep it on until issues then shutdown and use walkie talkies	1 day	Fri 4/29/11	Fri 4/29/11	136
137	Switchboard Control Room	0 days	Fri 4/29/11	Fri 4/29/11	137

ID	Task Name	Decision	Start	Finish	Predicted
138	required by IA to maintain batteries and heat/lighting and power in SWBD	1 day	Mon 5/2/11	Mon 5/2/11	138
139	House Air	0 days	Thu 3/24/11	Thu 3/24/11	139
140	Air compressors-need at least one AC and dryer running	1 day	Fri 3/25/11	Fri 3/25/11	140
141	need 100 psig air for deluge systems and whip	1 day	Mon 3/28/11	Mon 3/28/11	141
142	isolate all non-essential air	10 days	Fri 3/25/11	Thu 4/7/11	142
143	RO-lay up per manufacturer	5 days	Fri 4/8/11	Thu 4/14/11	143
144	House Service water	0 days	Sat 3/19/11	Sat 3/19/11	144
145	Keep HSW system Running for makeup water, fire water and cooling water	1 day	Mon 3/21/11	Mon 3/21/11	145
146	Fire Water	0 days	Sat 3/19/11	Sat 3/19/11	146
147	Keep Diesel Driven Fire Pump in service	1 day	Mon 3/21/11	Mon 3/21/11	147
148	Coal handling	0 days	Sat 3/19/11	Sat 3/19/11	148
149	Drain Fueling Station	3 days	Mon 3/21/11	Wed 3/23/11	149
150	Payloader	1 day	Thu 3/24/11	Thu 3/24/11	150
151	Dozer-store in hopper hse-charge up batteries	2 days	Fri 3/25/11	Mon 3/28/11	151
152	Locomotive-store in hopper hse-charge up batteries	2 days	Tue 3/29/11	Wed 3/30/11	152
153	Crusher cleanup	5 days	Thu 3/31/11	Wed 4/6/11	153
154	Bunkers-empty and clean-including beams etc.	15 days	Mon 3/21/11	Fri 4/8/11	154
155	Complete a "combustible Dust Cleaning Exercise"	15 days	Thu 4/7/11	Wed 4/27/11	155
156	Thaw Pits-drain	5 days	Thu 3/31/11	Wed 4/6/11	156
157	Coal Pile-shape in a small concentrated pile-ship to cayuga	30 days	Mon 3/21/11	Fri 4/29/11	157
158	Pulverizer Mill Motors-cover and Heat	5 days	Thu 4/7/11	Wed 4/13/11	158
159	Waste Water Treatment Facility	0 days	Sat 3/19/11	Sat 3/19/11	159
160	maintain in good working order	1 day	Mon 3/21/11	Mon 3/21/11	160
161	Control systems	0 days	Sat 3/19/11	Sat 3/19/11	161
162	Keep energized-including I/O	1 day	Mon 3/21/11	Mon 3/21/11	162
163	Admin Building/Bldg Protection	0 days	Sat 3/19/11	Sat 3/19/11	163
164	HVAC etc-stays running	1 day	Mon 3/21/11	Mon 3/21/11	164
165	BLOWASS	0 days	Sat 3/19/11	Sat 3/19/11	165
166	Cover and Heat Hammer Mill and Fan Motors	5 days	Mon 3/21/11	Fri 3/25/11	166
167	Make sure all combustible Dustan wood residues are removed/vacuumed	25 days	Mon 3/28/11	Fri 4/29/11	167

Exhibit 1
Attachment 6

Exhibit 1
Attachment 6

On March 18, 2011 AES Greenidge was placed in long-term protective layup status. Given the economic/load demand situation at the time, we expected that such status would exist for a period of approximately two years.

During that period electric market conditions were monitored to determine the economic viability of restart of the unit. Also during that period, efforts were ongoing to ensure readiness for a restart at any time during the lay-up period. These efforts included ongoing compliance activities, maintenance of equipment to ensure quick reactivation, and keeping the source in New York State's emissions inventory.

One permanent employee was maintained at the site and 2 temporary employees augmented the operations throughout the lay-up. As of today 2 full time employees work at Greenidge preparing for reactivation of the facility. Also Greenidge has maintained Security presences at the site during the entire lay-up.

During the lay-up the facility constantly operated auxiliary equipment and the Waste Water Treatment Plant. At any time Greenidge could have remediated the Coal Pile to alleviate the need to operate the WWTP but choose to keep the facility in an operationally ready state and burdened the cost of operating the WWTP.

The electrical and control system at the facility is energized and in a ready state for operations.

It is anticipated there would be no capital improvement cost associated with reactivation of this facility.

Here is a list of activities that took place during the lay-up period.

Protective Layup - March 18, 2011

Boiler

- Deslag and lance boiler and vacuum all the ductwork-including the windboxes.

- Drain and steamed dried all the water side tubes

Air heaters

- Wash airheaters to stop any corrosion

Fuel oil ignition/startup systems

- Drain the piping from the tanks and all the piping in the plant isolate the FO tanks.

- Pulled all the 16 igniters and put in storage.

Pulverizer Mill Motors

- Covered and heated all motors

- Vacuumed out Pulerizers and exhauster to protect from corrosion

Urea Storage

- Drain the system totally-including the storage tanks.

- Flush the system with water & freeze protected.

Maintained Heat Trace System

Catalyst

Vacuum

Activated Carbon Injection system

Vacuum silo and piping system

Sootblower System

Drain entire system.

Ash Removal Systems

Vacuum out hoppers and all piping

Lime Injection system

empty the three storage silos

open up the silo baghouses and cleaned the bags off

accumulated various conveyance piping.

put heat inside blower cabinets

clean out all the internals on the airlocks

H2O Injection system

build an enclosure around the motors and heat.

drain piping system and storage tank -pull out the lance/nozzle and store

Hydrator

clean feeders, weigh belt, mixer, paddles etc.

Air Slides

vacuum

Baghouse

cleaned thoroughly by pulse operation & running air slide blowers

isolate with inlet outlet dampers

isolate and blow down air system

Ash Removal system for baghouse

cleaned out both ash silos(bins)

cleaned out conveyance piping

cleaned out internals to the feeders

heat blower cabinets

Booster fan

Inspect and clean internals as necessary

Ensured Heaters and alarms are functional

ID Fans

enclose the motors and add heat

Stack

Inspect prior to restart

Dry Fly Ash Storage/loading system

empty silo-cleaned out bottom and wash out

cleaned pug mill

Open up and cleaned out both baghouses

Bottom Ash removal

drained and isolated/wash down ash pit/clean out clinker grinder
ash pit seal is totally drained and dry.

Bottom Ash Pond (C) GREENIDGE

empty out pond of most bottom ash

CEMs

Maintained CEMS system to ensure compliance

FD Fans

enclose the motors and add heat

Boiler Feed pumps

cover motors and heat
drain the belly drains
drained coolers

High Pressure heaters

drained and added N2
deenergized the drip pots and all solenoids etc

Deareator

drained and dried storage tank

Condensate Pumps

cover motors and heat
drained out condensate well

LP Heaters

add N2 blanket
drain and dry Hotwell

Turbine/Generator

Rotor - take off from turning gear to preserve bearings

Turning Gear

kept operational

Lube Oil

lube oil system - transferred all oil to storage tank

Generator

Degass Generator and shut down iron Horse
Maintained a CO2 Blanket on Generator

4A and 4B GSU

monitor oil levels
Maintained N2 Blanket

Exciter/Spare Exciters

Enclosed and put heat in it

Diesel Generator

Keep in good running Order
Ran Periodically

Circuit Breakers and associated switchgear

racked out

SSTs

monitor oil levels

Maintained N2 Blanket

DC Backup/Batteries

required by IA to maintain and test and monitor

Joint Use Equipment

required by IA to maintain batteries and heat/lighting and power in SWBD

Lighting

Went to minimum-just enough to walk around safely

PA System

keep it on until issues then shutdown and use walkie talkies

Switchboard Control Room

required by IA to maintain batteries and heat/lighting and power in SWBD

House Air

isolated all non-essential air

Maintained system to running order - Necessary for WWTP

Reverse Osmoses

Drained and Dried

House Service water

Drained distribution piping system to protect from freezing

Fire Water

Drained distribution piping system to protect from freezing

Coal handling

Drain Fueling Station

Payloader

Dozer stored in Dozer Garage - Run periodically

Locomotive-store in hopper house-kept charge on batteries

Bunkers-empty and clean-including beams etc.

Completed a "combustible Dust Cleaning Exercise"

Thaw Pits

Drained back to Fuel Oil Storage

Control systems

Kept energized-including I/O

Maintained RTU System with NYSEG

Admin Building/Bldg Protection

Maintained Heating System

Maintained Phone System

BIOMASS

Cover and Heat Hammer Mill and Fan Motors

All combustible Dust was removed/vacuumed

Emptied all silos and piping systems

Waste Water Treatment Facility

Continually maintained and operated the WWTP throughout the entire lay-up period

LAYUP PLAN



LOCKWOOD ASH DISPOSAL SITE

Prepared on behalf of:

AES Greenidge, L.L.C.

590 Plant Road

P. O. Box 187

Dresden, New York 14441

Prepared by:

DAIGLER ENGINEERING P.C.

1711 Grand Island Blvd.

Grand Island, New York 14072-2131

May 2011

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LAYUP PLAN
Lockwood Ash Disposal Site
AES Greenidge, LLC

TABLE OF CONTENTS

1	INTRODUCTION.....	1-1
1.1	BACKGROUND.....	1-1
1.2	PROTECTIVE LAYUP STATUS	1-1
1.3	PURPOSE OF REPORT	1-2
2	SITE CONDITIONS AND INFRASTRUCTURE	2-1
2.1	APPROVED WASTES, ORIGIN AND COMPOSITION	2-1
2.2	LANDFILL BASELINER SYSTEM	2-1
2.2.1	<i>Original Ash Disposal Site</i>	2-2
2.2.2	<i>Stage I</i>	2-2
2.2.3	<i>Stage II</i>	2-3
2.3	LEACHATE MANAGEMENT	2-3
2.4	WASTE QUANTITIES AND REMAINING WASTE CAPACITY	2-4
2.5	STORM WATER MANAGEMENT	2-5
2.6	ENVIRONMENTAL MONITORING.....	2-5
3	FOCUSED SITE INVESTIGATION.....	3-1
3.1	UPDATED MAPPING	3-1
3.2	FIELD RECONNAISSANCE	3-1
3.3	COVER SURFACE CONDITIONS	3-1
3.3.1	<i>Grading and Slopes</i>	3-1
3.3.2	<i>Soil Types and Thickness</i>	3-1
3.3.3	<i>Sinkholes</i>	3-2
3.3.4	<i>Vegetation</i>	3-2
3.4	SURFACE WATER	3-3
3.5	VECTORS.....	3-3
4	LAYUP PLAN.....	4-1
4.1	GRADING AND ACCESS	4-1
4.2	COVER SOIL	4-2
4.3	VEGETATION.....	4-3
4.4	VECTOR CONTROL	4-4
4.5	SURFACE WATER DRAINAGE	4-4
5	LAYUP PERIOD MAINTENANCE AND MONITORING.....	5-1
5.1	MAINTENANCE.....	5-1
5.2	RECORDKEEPING.....	5-2
5.3	ENVIRONMENTAL MONITORING.....	5-2
6	FINANCIAL ASSURANCE.....	6-1

LAYUP PLAN
Lockwood Ash Disposal Site
AES Greenidge, LLC

TABLE OF CONTENTS

List of Tables

Table 4-1	Typical Topsoil Content	Page 4-3
Table 4-2	Cover and Soil Summary	Follows Figure 4-1

List of Figures

follows page

Figure 1-1	Lockwood Ash Disposal Facility – Schematic Site Plan.....	Page 1-1
Figure 4-1	Existing Cover Investigation Plan	Page 4-3

List of Attachments

Attachment 1	Field Notes
Attachment 2	Drawings
	Sheet 1 - Site Plan
	Sheet 2 – Layup Plan

1 INTRODUCTION

1.1 BACKGROUND

AES Greenidge, L.L.C. (AES) owns a coal fired electrical generating plant on the west shore of Seneca Lake near the Village of Dresden in the Town of Torrey, Yates County, New York. In support of the power plant operation, AES also owns the Lockwood Ash Disposal Site located on Swarthout Road, across NYS Route 14 from the power plant. This land disposal facility is authorized by 6 NYCRR Part 360 Solid Waste Management Facility Permit No. 8-5736-00005/00003, which expires on September 4, 2018. Operations at the landfill are currently carried out under subcontract to City Hill Construction, Inc. (CHC) of Penn Yan, New York. CHC maintains a yard, shop, and permitted surface mine approximately two miles south of the facility.

The Lockwood Ash Disposal Site is approved by New York State Department of Environmental Conservation (NYSDEC) for the disposal of fly ash, bottom ash, water/wastewater sludge and mill rejects. The permitted area of the landfill is 44.2-acres, consisting of the soil lined original ash disposal site (OADS), and a four-stage, geosynthetic lined expansion of this original footprint. The landfill has been accepting coal combustion byproducts (CCBPs) produced at the Greenidge Station and other coal burning facilities since approximately 1979. To date, ash has been placed within about 30 of the permitted acres, including the OADS, Stage I, and Stage II. Stage III and IV are not yet constructed. Figure 1-1 illustrates the landfill stages and the major infrastructure of the site.

1.2 PROTECTIVE LAYUP STATUS

The Greenidge Power Generating Station is in the process of entering a protective layup status. Power generation at the site would only re-start if market conditions changed considerably. AES has announced a sale process that may result in another entity continuing to run the station, and intends to keep NYSDEC abreast of any developments in that regard.

As an integral element of power station operations, the Lockwood Ash Disposal Site is also being prepared for protective layup. Consistent with tenets of landfill design and environmental protection, the Layup Plan must provide for a system that will contain and isolate the wastes,

securely route leachate for treatment, reduce infiltration, control erosion, contain sediments and properly route storm water drainage. The primary means of achieving this goal is to provide for and maintain a cost effective interim cover and drainage system for the landfill.

While the Lockwood Ash Disposal Site will be under protective layup, AES will maintain a discreet area inside the landfill containment system for more limited disposal of permitted materials from other approved sites, including a small amount of coal pile runoff (CPR) treatment sludge from the Greenidge Station when the CPR plant is operational. This operational area is located in the western portion of Stage I and II, and will be covered with an approximate six-inch thick cover soil layer for ready removal in the event CCBPs require disposal. All runoff from this un-vegetated area will be directed to the contact sediment basin for treatment.

On notice of the pending layup to the Region 8 NYSDEC engineer responsible for the Lockwood Ash Disposal Site, the NYSDEC is requiring that a written plan be prepared and submitted to the Department for review and approval. During a March 29, 2011 meeting at the Plant, the NYSDEC engineer laid out the following requirements for the layup:

- Provide for a suitable cover soil layer such that all CCBPs are adequately contained;
- Adequately manage surface water drainage and control runoff;
- Establish acceptable vegetative cover before the end of the growing season; and,
- Prepare a plan that will be consistent with the final closure plan to reduce future closure time and cost liability.

1.3 PURPOSE OF REPORT

In accordance with the requirements of the NYSDEC, AES retained Daigler Engineering, PC (DE) to prepare the requested documentation. In general, the following actions were undertaken to complete the Layup Plan:

- Obtained the April 2011 topographic survey for current fill topography;
- Complete a field investigation intended to define the existing soil cover thickness and vegetation conditions; and,
- Prepare a layup period drainage, erosion and sediment control plan.

The purpose of this Report and the Attachments is to present the information gathered in the design of the Layup Plan, and identify the steps needed to safely and securely manage the materials disposed at the site during the protective layup period.

2 SITE CONDITIONS AND INFRASTRUCTURE

Following is a brief description of the primary elements of the land disposal operation. A more complete presentation of the details of the facility design and its operations is available in the most recent Part 360 permit renewal application dated February 2007.

2.1 APPROVED WASTES, ORIGIN AND COMPOSITION

The landfill is approved for the disposal of CCBPs from various AES power plant operations including those at Greenidge, Hickling, Westover, Cayuga, and Jennison Stations. Coal bottom ash from Garlock, Inc. and coal fly ash from Eastman Kodak are also approved for disposal at the facility. The approved design capacity for this facility is 750 tons per day.

Coal combustion by-products and their admixtures consist largely of fly ash, bottom ash, bottom ash fines, pyrites, lime, polymer, sludges from the on-site sludge dewatering pond and wastewater treatment sludges. This waste primarily derives its chemical composition from the parent coal, and the principal constituents are oxides of silica, aluminum and iron.

The disposed material also contains unburned carbon, oxides of calcium, magnesium, phosphorous, potassium, sulfur sodium and small amounts of titanium. The waste water treatment plant sludge is a mixture of calcium sulfate and metal hydroxides resulting from the lime precipitation of coal pile drainage, maintenance cleaning waste waters and miscellaneous waste water collected and treated at the plant's waste water treatment facility.

2.2 LANDFILL BASELINER SYSTEM

To date, about 30 acres of the permitted 44.2-acre landfill area have been constructed, and waste has been disposed in those constructed areas. Landfill construction involved the excavation of native soils, the installation of ground water depression drains and the installation of basal liner and leachate collection systems.

2.2.1 Original Ash Disposal Site

The "Original Ash Disposal Site" (OADS) was constructed in two phases, the first in 1979 and the second in 1981. The OADS basal liner is constructed above a series of groundwater drain trenches, and consists of a two-foot thick compacted soil barrier and overlying two-foot thick layer of bottom ash, which acts as the leachate drainage layer. A network of leachate collection pipes are installed in the drainage layer. Currently, the OADS is closed with a soil based final cover system

2.2.2 Stage I

Stage I was constructed in 1989 and 1990 including a double liner constructed above natural soil deposits and a single geomembrane overfill liner atop the wastes in the OADS. The basal liner and underlying groundwater drainage trenches are constructed within natural soil deposits. The geomembrane overfill liner atop the OADS consists of the following components, in ascending order:

- A geotextile cushion layer;
- A 50 mil polyvinyl chloride (PVC) geomembrane liner;
- A geotextile cushion layer; and,
- A one-foot thick drainage layer including a leachate collection pipe network.

The basal liner in Stage I that is constructed on natural soil deposits above the underlying groundwater drainage trenches consists of the following components:

- A two-foot thick compacted soil liner;
- A secondary leachate collection and removal system composed of a four-inch thick sand layer;
- A geotextile cushion layer;
- A 50 mil polyvinyl chloride (PVC) geomembrane liner;
- A geotextile cushion layer; and,
- A two-foot thick drainage layer with an embedded leachate collection pipe network.

2.2.3 Stage II

Stage II was completed in 1992 as a double lined cell with a groundwater drainage trench system and basal liner consistent with the liner system in Stage I that is constructed on natural soil deposits.

2.3 LEACHATE MANAGEMENT

Leachate is defined as surface water runoff that falls on the waste material and subsequently enters the surface water drainage system, and liquid contained and collected by the basal liner systems. Leachate management at the site focuses on the conveyance of collected leachate to the sedimentation pond for treatment and subsequent discharge through a State Pollution Discharge Elimination System (SPDES) outfall.

Each cell includes a network of six-inch diameter PVC perforated lateral collection pipe that convey leachate flow to a 21-inch PVC header pipe. The header pipe in turn conveys leachate to the sedimentation pond for treatment and discharge. The leachate collection system piping is equipped with cleanout risers consisting of PVC pipe which are vertically installed and connected to the leachate piping and extending through to the ground surface. These cleanouts allow for periodic flushing (annually as a minimum) of the leachate collection pipes to help assure they are free and clear of any obstructions that may reduce liner system efficiency.

Leachate is collected from two separate and distinct base areas of the landfill, including the soil lined original ash disposal site (OADS), and the synthetic lined areas of Stage I and II. The currently approved disposal area in Stage I and II encompasses an approximate 19-acres.

Leachate collected from the original ash disposal area discharges to a pipe drain which conveys the leachate to the sedimentation basin. Leachate collected from the geosynthetic liner areas is also conveyed by a pipe header to the sediment basin located north of the original ash disposal area. This 130-foot wide, 550-foot long (1.6 acre) basin can contain up to about 5.5 feet of liquid, with a corresponding capacity of just under 3,000,000 gallons. The basin includes two inlet structures on the east bank, and one outlet structure on the west bank.

All leachate and contact storm water is held within the basin until the water surface reaches within 2.0 feet below the spillway. Once this level is reached, AES Creative Resource Laboratories of Johnson City, New York (an ELAP certified laboratory) obtains a composite sample of the stored water for analysis to confirm the SPDES effluent limitations will not be exceeded during basin discharge. Treated water from the basin is directed to the Keuka Lake Outlet via an approximate 600-foot long natural channel.

2.4 WASTE QUANTITIES AND REMAINING WASTE CAPACITY

Since about 1979 the landfill has been accepting CCBPs and disposing them in the OADS, in Stage I, and in Stage II. The OADS was in service between approximately 1979 through 1992, and it is estimated that 540,000 cubic yards of CCBPs and operational soils have been disposed therein. It is further estimated that as of December 30, 2010 about 1,157,000 cubic yards of CCBPs and operational soils have been disposed in Stage I and II. In total, about 1,697,000 cubic yards of CCBPs and operational soils are managed on site.

The remaining capacity for the currently constructed synthetically lined area and the 44.2-acre permitted area has most recently been determined using the scale waste receipts and waste density test data for 2010, assuming a five percent cover soil volume. As of December 29, 2010 the airspace computed for the completed Phase 1 filling plan¹ was 433,150 cubic yards. Conservatively assuming an effective landfill use rate of 100,000 tons per year (or 86,957 cubic yards per year), the life of Phase 1 under normal operations was projected through five years, or the end of 2015.

The airspace that would be available in the not yet constructed stages of the 44.2-acre landfill is approximately 2,450,000 cubic yards. Assuming a use rate of 100,000 tons per year the life of the not yet constructed stages is approximately 26 years.

¹ Phase 1 filling rises to a working surface at approximately elevation 710 within the currently approved fill area.

2.5 STORM WATER MANAGEMENT

For the Lockwood Ash Disposal Site, surface water drainage patterns are designed to segregate contact water and non-contact water. Contact water is defined as any runoff that has come in contact with the disposed CCBP's, and non-contact as runoff that has not.

Contact surface water runoff is conveyed to the contact water sedimentation pond and mixed with leachate emanating from the leachate collection system and any liquid from the leak detection system. The contact water sedimentation pond is authorized to discharge under SPDES Permit No. NY-0107069 at Outfall 001 as a controlled release batch discharge to the Keuka Lake Outlet. The SPDES Permit restricts the discharge rate as a function of stream flow rate in the Outlet, as measured and recorded through a data logger at the USGS Gauging Station in the Village of Dresden. Prior to any discharge, the collected contact water and leachate is sampled and analyzed to determine that the SPDES Permit discharge water quality requirements will be met. Discharge volumes are calculated for each batch release.

Non contact water is routed through the non-contact surface water drainage system to one of two sediment basins as shown on Sheet 1 in the Drawings.

2.6 ENVIRONMENTAL MONITORING

The Lockwood Ash Disposal Facility Environmental Monitoring Program (EMP) addresses on-site and off-site groundwater, surface water and leachate quality monitoring, identifying the location of all environmental, facility, and other monitoring points, the sampling schedule, analyses to be performed, statistical methods, and reporting requirements. The EMP also includes a contingency water quality monitoring plan which specifies trigger mechanisms for its initiation. Monitoring points of compliance are shown in Figure 1-1.

3 FOCUSED SITE INVESTIGATION

To help prepare an adequate Layup Plan, an updated topographic survey and a focused field reconnaissance were completed.

3.1 UPDATED MAPPING

The updated mapping inside and immediately adjacent the approved fill limits was prepared by Richard Willson, PLS of Penn Yann, New York from select field measurements of ground surface elevation and road edges obtained on mid April 2011. Mr. Willson provided DE a digital terrain model (DTM), and electronic (.csv) files for each three dimensional ground surface coordinate used to develop the map.

3.2 FIELD RECONNAISSANCE

DE completed a shallow cover soil investigation on April 12 and April 25, 2011 to define the general site conditions, cover soil types and thickness, surface water runoff patterns, potential for migration of surface leachate and the nature and extent of any current site condition that might have the potential to allow a future release from the landfill. The wet weather conditions during the April 12 site reconnaissance were helpful in establishing the potential for fugitive leachate, and to define surface water drainage patterns and discharges. It is noted here that due to the inorganic nature of the CCBP fill, explosive gas was not considered a potential concern.

3.3 COVER SURFACE CONDITIONS

3.3.1 Grading and Slopes

Given the progress of filling at the site, areas along the east and west slopes have obtained final grade. No signs of slope instability were observed. Minor, moderate, and severe soil erosion was observed however in most areas of the landfill. As is expected, the more severe erosion is found on the longer and steeper slopes.

3.3.2 Soil Types and Thickness

To determine the texture, thickness and consistency of the existing cover soils, 16 shallow soil probes and 15 shovel holes were advanced and logged across the permitted waste disposal area.

A 24-inch long 1¼-inch diameter replaceable tip stainless steel soil recovery probe was used to sample the soil cover above the waste ash. Given the amount of gravel contained in the soil matrix, the use of this probe was difficult, and a round nose shovel was then used to more easily excavate the exploratory holes. In some areas, it was possible to establish existing soil thickness in erosional rills. Each hole was logged to identify soil color, texture, consistency, moisture condition and thickness.

The existing cover soil layer consists predominantly of three types throughout its thickness: a moist compact silt with coarse-medium-fine (cmf) gravel; a sandy silt or silty sand; and, a moist, stiff clay and silt with a trace to little cmf gravel. The thickness of the cover soils where present ranged from a low of 1½-inches to more than 20-inches. In most locations the cover soil unit does not include a topsoil layer.

3.3.3 Sinkholes

Three sinkhole type features were found during the site reconnaissance, in the locations illustrated on Figure 4-1. These sinkholes suggest some piping of fines at depth, possibly related to previous woodchuck burrows. Previous observations of the clear nature of the leachate, and the lack of ash sediment buildup in the main trunk of the leachate drain suggests this piping is not associated with the leachate collection pipe system. No obvious surface discharge was found on the slopes or at lower elevations that would point to fugitive leachate or a specific cause of the sinkholes.

Copies of the field logs and sketches are included in Attachment 1. Figure 4-1 shows the plotted location of the exploratory holes.

3.3.4 Vegetation

The approximate extent of vegetation on the cover soil surface was determined during the field reconnaissance. This information is presented as an approximate percentage of vegetative cover across 19 distinctly identified areas of the landfill. Vegetation sustained on the landfill cover soil ranges from sparse to vigorous, with most areas of the landfill having to be re-seeded to improve the viability of the cover system. Figure 4-1 shows the 19 different areas of the landfill that were identified largely on the basis of the percentage of vegetative cover.

Table 4-2 summarizes the existing soil thickness and cover conditions found in each of the 19 areas.

3.4 SURFACE WATER

This focused investigation included observations to identify the general surface water runoff patterns at the site, and the condition of the drainage structures. Observations for surface water runoff patterns include inspections for signs of fugitive leachate, and an assessment of the potential for fugitive contact and non-contact runoff to discharge from other than the contact and non-contact drainage systems. Observations for the conditions of the drainage system included inspections for erosion, structural failure, and sediment buildup.

No fugitive leachate was observed during the two day field reconnaissance. It was noted that some contact water discharge had been conveyed to Non-contact Sediment Basin 1 at the southwest corner of the OADS; however, at this time the most recent working face area has been covered, minimizing any impact from that condition.

Non-contact runoff from the small watershed at the southwest corner of the landfill is now directed to a perimeter swale and off-site before entering a non-contact sediment basin. No signs of fugitive ash were observed in that channel.

Some erosion is noted in the recently graded channel for the new road subbase along the western margin of the landfill, and at steeper channels that do not include other than vegetative erosion protection. Corresponding buildup of fine and coarse grained sediments are present at the stilling basin for the steeply grade landfill access road on the east slope, and the culvert conveying non-contact runoff below the contact channel at the northeast corner of the OADS.

3.5 VECTORS

The site reconnaissance revealed the presence of numerous and active woodchuck burrow openings in the cover. Woodchucks prefer easy to dig sand-silt-clay and sandy loam soils, which comprise a significant amount of the cover for this landfill. The woodchucks burrow openings are approximately ten to 12 inches in diameter. Many burrows will have a drop hole near the main burrow opening up to two vertical feet in depth for quick escapes from the surface. Each woodchuck

burrow characteristically will have up to four well hidden auxiliary entrances, without the presence of telltale soil mounds. Woodchuck tunnels are reported to reach up to 45 feet in length, and up to five feet in depth.

Approximately ten to fifteen openings were observed in the cover, but not were mapped. Many of the openings were demonstrated to have penetrated the cover soil, as evidenced by the accumulation of both soil cover and ash mounds at their mouth.

4 LAYUP PLAN

4.1 GRADING AND ACCESS

The grading configuration proposed for the Layup Plan is very nearly the now current grading as defined by the Willson survey. The current grading will be slightly modified as needed to consolidate ash, promote controlled surface water drainage and for access roadway construction. For instance, grades in the uppermost plateau will be slightly modified by placing a slightly thicker soil fill to promote surface water drainage away from the east slope and toward the proposed north slope downchute.

Primary access to the top of the fill will be afforded by the east slope incised road. It is proposed that a new connector road segment will be built at the top of the fill to connect the east slope incised road segment to the southwest slope roadway, creating the preferred looping road network.

Access to the intermittent fill area will be afforded by a re-construction of the current access road to this area. During operations, two temporary ash fill access ramps were built above the well covered western portion of Stage I. These two ash ramps, and the associated culverts that convey surface water runoff below them, will be excavated to expose the buried cover system. Ash fill from the ramps will be placed in the identified intermittent working face; the culverts will be reclaimed and re-used. While the easternmost of these two ramps and its culvert are the primary access to the intermittent working face and will be removed, the roadway will be restored at a lower elevation and become a drainage divide between the contact drainage shed and a non-contact drainage shed.

Recently, the operator built the base for a perimeter access road at the western edge of the approved fill area, whose primary purpose is to allow all weather access to the leachate pipe cleanouts for the jetting truck. The base for this road segment will be regraded and augmented as needed to allow a continuation of the gravel surfaced north perimeter road.

In addition to the above referenced operational road network, a perimeter roadway carries intermittent traffic from the site entrance gate to the historic borrow area located west of the

landfill. This perimeter road forms a drainage divide separating upgradient stormwater flows from the controlled landfill related stormwater flows.

4.2 COVER SOIL

The soil based cover system proposed for protective layup is the intermediate cover system described in Section 8.2 of the facilities February 2007 Operation and Maintenance (O&M) Manual, as follows:

- Six to nine inches of clayey/silty soils, sandy soils or gravelly soils, or other NYSDEC approved materials;
- Three to four inches of soil suitable to sustain vegetative growth; and,
- Vegetation as needed to control fugitive dust and erosion.

Vegetation requirements are presented in Section 4.3.

As shown, a variety of soil textures can be used for intermediate cover. It is suggested that the finer grained clayey/silty soils be used on areas that have obtained final grade, thereby contributing to the isolation of the CCBPs. The coarser grained sandy soils are best used in areas where additional trafficking may occur, such as the upper plateau and the intermittent working area.

Soil suitable to sustain vegetative growth is soil with sufficient nutrients, and a proper pH for healthy plant growth. Nutrient deficiencies may be corrected using fertilizers. Excess acidity may be corrected with lime and excess alkalinity by the application of sulfur or other suitable acidifying compounds. Tests needed to evaluate a source material will establish the soils pH, the presence and amount of organic matter, inorganic matter (sand, silt and clay), and deleterious materials (rock, cinders, slag, roots). The pH of the soil should range between 6 and 7. Soil fertility shall be analyzed by a qualified laboratory to determine the need for nutrient amendment by the addition of fertilizers. Typical ranges of soil content and texture are shown in Table 4-1, and soils falling within these ranges will generally form a suitable topsoil.

**Table 4-1
TYPICAL TOPSOIL CONTENT**

CATEGORY	PERCENTAGE BY MASS
Deleterious Material*	5 maximum
Organic Material**	2 to 20
Sand**	20 to 60
Silt and Clay**	35 to 70

* on total sample

**on fraction of soil sample passing the No. 4 sieve.

Figure 4-1 presents the results of the field reconnaissance completed to define the amount of cover and the general ground conditions. Table 4-2 provides a summary description of the conditions for each area depicted in Figure 4-1, as well as a breakdown of the thickness measurements, and estimates the amount of additional cover soil and topsoil that will be needed in each area.

4.3 VEGETATION

Vegetative cover will be established using a seed mixture identified in Section 02936 of the Technical Specifications found in the facilities CQA/C!C Plan. Alternate seed mixtures will be reviewed by AES prior to approval. All seeding shall be completed in accordance with the requirements of Section 02936. Fertilizer shall be applied first in accordance with the recommendations of the laboratory. The seed bed soils will be tilled prior to seeding with any amendments (e.g. fertilizer) mixed into the upper two inches. Seed can be mechanically or hydraulically planted. Mulch shall be applied to retain moisture moderate soil temperature and reduce erosion.

The cover placement schedule allows for planting in the late summer and early fall months such that the site will obtain a good growth of vegetation before the onset of winter.

4.4 VECTOR CONTROL

A vector remediation program will be implemented by AES. To begin, a Nuisance Wildlife Control Operator (NWCO) licensed by NYSDEC will be retained to remove to eliminate the woodchuck population on the landfill. Once the woodchuck population has been controlled, routine inspections of the cover system will include observations for borrowing or any other signs degradation by wildlife. The NWCO will be recalled as necessary to control this vector.

4.5 SURFACE WATER DRAINAGE

The structural elements of the layup period stormwater management system will consist of a network of erosion resistant vegetated or rock lined swales and channels, rock lined downchutes and stilling basins, pipe culverts and manholes to convey stormwater from the landfill to one of three sediment basins. Channel linings in the form of vegetation and stone rip-rap have been selected based on flow velocity, and the potential for scour at channel intersections, drainage structures and the like.

The drainage control structures are designed to prevent ponding and erosion to the cover system for a peak discharge from the 24-hour, 25-year frequency storm. Where flow velocities erosive to grass lined channels will develop under storm conditions, stone lined swales or channels are specified. The system includes both contact and non-contact stone fill lined perimeter and roadside channels of varying widths and depths.

Sideslope diversion swales with a design slope of 0.015 will be constructed at vertical intervals of approximately 30-feet on steeper sideslope areas. The grass lined swales are positioned to intercept sideslope run-off for controlled diversion to downchutes. The diversion swales are designed to convey the 25-yr, 24-hr storm and safely convey the 100-yr, 24-hr storm with 0.25-feet of freeboard.

Rock-lined downchutes will be trapezoidal and will traverse down the steeper slopes where needed. In addition, stone lined drainage swales will convey stormwater down the 3:1 sideslopes to the perimeter drainage channels.

The non-contact perimeter channels will convey flows from downchutes and other tributary channels to the non-contact sediment basins, which will allow for settlement of suspended solids in the stormwater runoff.

The contact water sediment basin is operated as a batch discharge and is not subject to the hydraulic design completed for the non-contact basins.

5 LAYUP PERIOD MAINTENANCE AND MONITORING

Continuing environmental monitoring, monthly site inspections, and repair and maintenance of the cover system, drainage structures, and access roads as required is a key element of the Layup Plan. The Layup Plan includes continued routine inspection by a qualified individual to inspect all features of the disposal site plus supporting facilities, such as the sedimentation basins. The purpose of this inspection program is to verify the proper performance of the facilities and to prepare and file a site inspection report. If any site features are not functioning properly, the inspector would coordinate with the appropriate individual to remediate.

The landfill will be inspected monthly, and after any five year, 24-hour rainfall event. In addition, the leachate management system, groundwater monitoring wells, perimeter fencing and site roads will be inspected quarterly.

5.1 MAINTENANCE

Maintenance will include routine and as needed maintenance of the cover system; and as-needed maintenance of the remaining facility components. Routine maintenance of the leachate collection and conveyance system will consist of annual flushing of system pipes. The purpose of this flushing will be to identify clogged and/or failed pipes.

Spot repairs of the cover system may potentially require the replacement of both topsoil and subsoil, depending on the depth of soil loss. A dozer would be used to strip topsoil in the area where replacement of subsoil is found to be necessary. Subsoil would then be placed and compacted, followed by placement of topsoil suitable for the development of vegetative growth. The topsoil would then be properly seeded. Temporary stabilization measures would be put in place to prevent erosion while vegetation is developing. Seeding and erosion control will be executed in a manner consistent with the New York Guidelines for Urban Erosion and Sediment Control. The goal of these maintenance activities would be to restore a stable, uniform final cover slope to promote drainage.

While due to the non-putrescible nature of the landfilled waste, differential settlement of the cover system is expected to be rare, more significant repairs to the cover system will be

undertaken if signs of differential settlement are found during routine inspections. Visual indicators include ponding water, subsidence and cracks in the cover. These areas will be regraded and reseeded, and the regraded area will be stabilized to prevent erosion. Regrading and stabilization activities will be executed in a manner consistent with the New York Guidelines for Urban Erosion and Sediment Control. The area of cover under which differential settlement was suspected to have occurred will be inspected weekly for a two month period before the normal inspection schedule is resumed.

5.2 RECORDKEEPING

Summaries of inspection and maintenance activities will be included in the facility's Annual Report. Records of inspections and maintenance activities will be kept for a minimum of seven years from the date they are completed. Records of inspections will include the following information:

- Date and time of the inspection;
- Name of the individual performing the inspection;
- Description of the inspection performed and observations recorded;
- Date and time of any remedial actions taken or repairs made; and,
- Appropriate photographic documentation as necessary.

5.3 ENVIRONMENTAL MONITORING

During the layup period, groundwater, surface water and leachate will be monitored on a routine basis in accordance with the EMP for operational conditions.

6 FINANCIAL ASSURANCE

AES maintains a surety trust dated April 25, 2011 in the amount of \$4,546,221 for the 2010 operating year closure and post-closure costs. A signed electronic copy of the trust agreement was submitted to John Swanson of the NYSDEC Region 9 office on April 26, 2011.

The proposed Layup Plan reduces future closure time and cost by applying the six-inch minimum Soil Cover layer completely above the landfilled material, thereby providing for the first layer of final cover construction. As well, the extension of the cleanout risers and placement of the drainage channel on the western portion of the OADS will meet with the requirements of the closure design.

The surety amount for closure construction will be reviewed once the Layup Plan has been implemented to determine the appropriate reduction in cost liability. AES may petition the NYSDEC for a release of some portion of the fund, equal to the value of the closure work completed by the Layup Plan efforts.

Exhibit 1
Attachment 9

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF)	PETITION NO. 6-99-2
MONROE ELECTRIC GENERATING)	ORDER RESPONDING TO
PLANT)	PETITIONER'S REQUEST THAT
ENTERGY LOUISIANA, INC.)	THE ADMINISTRATOR OBJECT
PROPOSED OPERATING PERMIT)	TO ISSUANCE OF A STATE
)	OPERATING PERMIT
Proposed by the Louisiana)	
Department of Environmental)	
Quality)	
)	

**ORDER PARTIALLY GRANTING AND PARTIALLY
DENYING PETITION FOR OBJECTION TO PERMIT**

On February 9, 1999, Ms. Merrijane Yerger, Managing Director of the Citizens for Clean Air & Water ("CCAW" or "Petitioner"), petitioned the Environmental Protection Agency ("EPA"), pursuant to section 505(b) of the Clean Air Act ("CAA" or "the Act"), to object to issuance of a proposed State operating permit to Entergy Louisiana, Inc.'s Monroe Electric Generating Plant in Monroe, Louisiana ("Monroe plant"). The proposed operating permit for the Monroe plant was proposed for issuance by the Louisiana Department of Environmental Quality ("LDEQ") pursuant to title V of the Act, CAA §§ 501 - 507, the federal implementing regulations, 40 CFR Part 70, and the State of Louisiana regulations, Louisiana Administrative Code ("L.A.C."), Title 33, Part III, Chapter 5, sections 507 et seq.

Petitioner has requested that EPA review, investigate, and make an administrative determination on the entire matter of the proposed operating permit and planned restart of the Monroe plant, pursuant to section 505(b) of the Act and 40 CFR § 70.8(c). Petitioner alleges that the proposed operating permit is not in compliance with applicable requirements of the Act including Prevention of Significant Deterioration ("PSD") permitting requirements and New Source Performance Standards ("NSPS"). Petitioner also alleges that Entergy's operating permit application fails to adequately demonstrate compliance with hazardous waste disposal requirements under the Resource Conservation and Recovery Act ("RCRA").

For the reasons set forth below, I find that the proposed title V permit does not assure compliance with applicable PSD requirements as set forth in the Louisiana State Implementation Plan ("SIP"). I therefore grant the Petitioner's request in part and object to issuance of the proposed title V permit unless the

permit is revised in accordance with this Order. I deny the Petitioner's remaining claims.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. The State of Louisiana submitted a title V program governing the issuance of operating permits on November 15, 1993, and subsequently revised this program on November 10, 1994. 40 CFR Part 70, Appendix A. In September of 1995, EPA granted full approval of the Louisiana title V operating permits program, which became effective on October 12, 1995. 60 Fed. Reg. 47296 (Sept. 12, 1995); 40 CFR Part 70, Appendix A. This program is codified in L.A.C. Title 33, Part III, Chapter 5, sections 507 et seq. Major stationary sources of air pollution and other sources covered by title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See CAA §§ 502(a) and 504(a).

The title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and that compliance with these applicable requirements is assured. See Order In re Roosevelt Regional Landfill, at 2 (May 4, 1999). Such applicable requirements include the requirement to obtain preconstruction permits that comply with applicable new source review requirements. Id. at 8.¹

Under section 505(b) of the Act and 40 CFR § 70.8(c), states are required to submit all operating permits proposed pursuant to title V to EPA for review and EPA will object to permits

¹ Louisiana defines "federally applicable requirement" in relevant part to include "any standard or other requirement provided for in the Louisiana State Implementation Plan ("SIP") approved or promulgated by EPA through rulemaking under title I of the Clean Air Act that implements the relevant requirements of the Clean Air Act, including any revisions to that plan promulgated in 40 CFR part 52, subpart T." L.A.C. 33:III.502. EPA approved a PSD program in the State of Louisiana's SIP on April 24, 1987. 52 Fed. Reg. 13671; 40 CFR § 52.986. Thus, the applicable requirements of the Act respecting the Monroe plant permit include the requirement to comply with the applicable PSD requirements under the Louisiana SIP.

determined by the Agency not to be in compliance with applicable requirements or the requirements of 40 CFR Part 70. If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit.

To justify exercise of an objection by EPA to a title V permit pursuant to section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of Part 70. Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period. A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has not been issued, the permitting authority shall not issue the permit until EPA's objection has been resolved. 40 CFR § 70.8(d).

II. BACKGROUND

The Monroe plant, located in Monroe, Louisiana,² currently consists of three units (Units 10, 11 and 12), each with a boiler and ancillary equipment, which were installed in 1961, 1963, and 1968, respectively.³ Each boiler is fired primarily with natural gas, but is also capable of being fired with diesel fuel oil.⁴

² The Monroe area is currently designated as attainment for all National Ambient Air Quality Standards ("NAAQS") established by EPA.

³ The City of Monroe built the plant in approximately 1895, and owned and operated the plant until 1978, when Louisiana Power & Light became the operator and subsequently the owner of the plant. Louisiana Power & Light changed its name to Entergy Louisiana, Inc. in 1996.

Units 10, 11 and 12 are the most recent additions Units 1 through 9 at the Monroe plant have been permanently decommissioned. The last of these, Unit 9, was permanently retired effective December 31, 1987. See Memo from D.L. Aswell, LP&L, to William Phillips, SSI (Dec. 18, 1987). This memo and other documents referred to in this Order are on file with EPA.

⁴ The proposed title V permit would allow up to 15 percent of the facility's fuel use to be diesel fuel oil.

The rated capacities of the units are 23 megawatts ("MW"), 41 MW, and 74 MW, respectively. The total heat input for the units is 1,961 million British thermal units ("MMBtu"). Installation of these boilers was not subject to PSD review because it predated the PSD program.

On July 1, 1988, Louisiana Power & Light ("LP&L"), predecessor to Entergy Louisiana, Inc. ("Entergy"), placed the plant's three units in extended reserve shutdown ("ERS").⁵ According to Entergy, these units were placed in extended reserve shutdown because of the addition of new electric generating capacity in the area. Memo from Entergy to EPA, "Actions Taken By Entergy At Monroe Generating Station." At the time of shutdown, LP&L projected that Units 10, 11 and 12 would not be needed for three to five years. Id. That period grew to eleven years as a result of "many factors," according to Entergy, including increased competition and demand-side management. Id.

Some time around September, 1988, LP&L initiated a number of activities at the Monroe plant to prepare the plant for extended shutdown, including draining, disconnecting and covering equipment, and installing and operating dehumidification equipment to prevent corrosion of the units. During shutdown, LP&L/Entergy conducted some inspection and maintenance activities, primarily in response to problems with the

⁵ Memo from E.M. Ormond, LP&L, to Glenn F. Phillips (June 28, 1988). Extended reserve shutdown is a program implemented by the Entergy Operating Companies (of which Entergy Louisiana is a member) in the mid-1980's to save money by placing units in inactive status and reducing operating staff, maintenance costs, and deferring the cost of repairing units. See Louisiana Public Service Commission, Order No. U-20925-G at 8-9 (Nov. 18, 1998).

The record further reflects that the units were not in regular operation for several years prior to placing the units in extended reserve shutdown. See Letter from Entergy to Jayne Fontenot, Chief, Permits Issuance Section, EPA, Region VI (July 18, 1994) (noting that Monroe plant has not operated on a routine basis since 1981). Internal LDEQ memoranda further suggest that the Monroe plant ceased operating around January 1988. See Memo from Paul Laird, LDEQ Northeast Regional Office, to John R. Newton, LDEQ, Air Quality Div. (Feb. 8, 1989); Memo from Paul Laird, LDEQ Northeast Regional Office, to John R. Newton, LDEQ, Air Quality Div. (Feb. 24, 1988).

dehumidification system.⁶ During this period, LP&L/Entergy also maintained relevant environmental permits for the Monroe plant, including payment of air quality maintenance fees to LDEQ (between \$1,100 and \$1,300 per year), maintenance of water permits, and applications for an acid rain permit (received October 23, 1996) and a title V operating permit.

Entergy now proposes to restart Units 10, 11 and 12 at the Monroe plant beginning this summer. On September 16, 1996, Entergy submitted a title V permit application to LDEQ. The total estimated annual emissions of air pollutants associated with the plant, in tons per year ("tpy"), are as follows: nitrogen oxides ("NO_x"), 4,972.65 tpy; sulfur dioxide ("SO₂"), 679.84 tpy; carbon monoxide ("CO"), 361.65 tpy; particulate matter ("PM₁₀"), 32.46 tpy; and volatile organic compounds ("VOCs"), 12.74 tpy. These projected annual emission rates are incorporated as annual emission limits in the proposed title V permit. The requested operating permit includes no limitations on the hours of operation or the capacities at which the units would operate. Most relevant for purposes of this Order, neither the permit application nor the proposed permit provides for obtaining a PSD permit for the units prior to restart, under the Louisiana PSD program.

LDEQ submitted a proposed title V permit to EPA Region VI for review on November 16, 1998. The permit went out for public comment on November 25, 1998. Public commenters requested a public hearing. Notice of a public hearing was published on January 16, 1999. A public hearing was held by LDEQ on February 18, 1999. The public comment period ended April 20, 1999. EPA's 45-day review period expired on December 31, 1998. On February 9, 1999, Citizens for Clean Air & Water filed a timely petition with EPA pursuant to section 505(b)(2) of the Clean Air Act requesting that EPA object to issuance of the proposed permit for the Entergy Monroe plant. As of this date, no final permit has been issued.

III. ISSUES RAISED BY PETITIONER

Petitioner objects to issuance of the proposed permit on five grounds: (1) LDEQ failed to subject the Monroe plant to PSD review; (2) the maximum capacity of the Monroe plant may have been increased by some unknown method at some time between 1976

⁶ Other activities included stack inspections in 1992, installation of an oil/water separator for the stormwater system in 1996, and cleaning of the diesel fuel oil tank system in 1996.

and the time of the title V application without being subject to PSD review or NSPS; (3) the proposed permit fails to incorporate enforceable one-hour maximum emission rate limitations for sulfur dioxide and other criteria pollutants; (4) the proposed permit includes apparent annual emissions increases that suggest PSD review should be conducted for the sulfur dioxide emissions; and (5) sufficient information has not been provided in Entergy's permit application to ensure compliance with RCRA disposal requirements.⁷

In addition, the Petitioner requests the following: (1) that EPA issue an information request letter to Entergy and the City of Monroe under section 114 of the Act, requiring them to disclose all matters raised by this petition; and (2) that EPA conduct an on-site inspection of the Monroe plant to determine whether PSD and NSPS have been triggered.

Items (1), (3) and (4) are either addressed in the PSD applicability analysis or rendered moot by EPA's conclusion that the proposed title V permit must be revised to ensure compliance with applicable PSD requirements. Section V addresses Item (2); Section VI addresses Item (5). In response to Petitioner's request for an inspection, on May 17, 1999, EPA conducted an inspection of the Monroe plant to verify the activities being conducted at the plant and to confirm that the plant is not operating. Finally, in response to Petitioner's request that EPA issue an information request letter, EPA believes it has sufficient information to respond to the Petition and that there is no need at this time for such a letter.

IV. PSD APPLICABILITY ANALYSIS

The following sections describe EPA's analytical tests for determining PSD applicability and apply these tests to the proposed restart of the Monroe plant. EPA concludes that the proposed restart of the Monroe plant should be subject to PSD requirements and thus, that the title V permit does not assure compliance with the applicable PSD requirements set forth in the Louisiana SIP. The analysis in this Order, however, does not

⁷ These objections were also raised during the public hearing and in correspondence to LDEQ and Region VI from Mr. Alexander J. Sagady, Environmental Consultant, on behalf of CCAW, dated February 18, 1999. Accordingly, Petitioner has met her obligation to base the petition on objections to the permit raised with reasonable specificity during the public comment period.

purport to dictate the specific PSD permit terms that the State should adopt in revising the title V permit.

A. Analytical Approach

Part C of title I of the Clean Air Act establishes the statutory framework for protecting public health and welfare from adverse effects of air pollution, notwithstanding attainment and maintenance of all NAAQS. Congress specified that the PSD program is intended to:

- (1) "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources"; and
- (2) "assure that any decision to permit increased air pollution . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process."

CAA § 160.

To accomplish these purposes, the Act relies primarily on a permitting program as the mechanism for reviewing proposals to increase air pollution in areas meeting the NAAQS. The Act generally requires PSD permits prior to construction and/or operation of new major stationary sources and major modifications to stationary sources in areas designated attainment or unclassified for the pollutants to be emitted by the sources. See CAA §§ 165(a) and 169(2)(C). "Modification" is defined to include, "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." CAA § 111(a)(4). By regulation, EPA has limited the facially broad sweep of the PSD provisions to only "major" modifications. 40 CFR § 51.166(i); see also L.A.C. 33:III.509(I).

As described in the following sections, reactivation of facilities that have been in an extended condition of inoperation may trigger PSD requirements as "construction" of either a new major stationary source or a major modification of an existing stationary source. Where facilities are reactivated after having been permanently shutdown, operation of the facility will be treated as operation of a new source. Alternatively, shutdown and subsequent reactivation of a long-dormant facility may trigger PSD review by qualifying as a major modification. This section describes EPA's approach for analyzing whether restart of

a facility triggers PSD review as: (1) a new major source under EPA's Reactivation Policy; (2) a major modification by virtue of a physical change resulting in a significant net emissions increase; or (3) a major modification by virtue of a change in the method of operation resulting in a significant net increase in emissions.⁸

1. Restart Treated as New Source -- EPA's Reactivation Policy

EPA has a well-established policy that reactivation of a permanently shutdown facility will be treated as operation of a new source for purposes of PSD review.⁹ The key determination to be made under this policy is whether the facility to be reactivated was "permanently shutdown." In general, EPA has explained that whether or not a shutdown should be treated as permanent depends on the intention of the owner or operator at the time of shutdown based on all facts and circumstances. Shutdowns of more than two years, or that have resulted in the removal of the source from the State's emissions inventory, are presumed to be permanent. In such cases it is up to the facility owner or operator to rebut the presumption.

To determine the intent of the owner or operator, EPA has

⁸ Whether a source is subject to preconstruction review as a new source or as a major modification may be significant in particular cases for determining the appropriate analysis of control technology options and other PSD requirements. For example, analysis of control technology for major modifications might consider the age or configuration of the source where review for new sources might not. Likewise, analysis of alternatives for new sources might consider alternative locations where the same analysis for major modifications might not.

⁹ See Memo from Edward E. Reich, Director, Div. of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief, General Enforcement Branch, Region II (Sept. 6, 1978); Memo from Edward E. Reich, Director, Stationary Source Enforcement Div., to William K. Sawyer, General Enforcement Branch, Region II (Aug. 8, 1980); Memo from John S. Seitz, Director, Stationary Source Compliance Div., OAQPS, to David P. Howekamp, Director, Air Mgt. Div., Region IX (May 27, 1987); Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987); Memo from John B. Rasnic, Director, Stationary Source Compliance Div., OAQPS, to Douglas M. Skie, Director, Air Programs Branch (Nov. 9, 1991).

examined factors such as the amount of time the facility has been out of operation, the reason for the shutdown, statements by the owner or operator regarding intent, cost and time required to reactivate the facility, status of permits, and ongoing maintenance and inspections that have been conducted during shutdown. No single factor is likely to be conclusive in the Agency's assessment of these factors, and the final determination will often involve a judgment as to whether the owner's or operator's actions at the facility during shutdown support or refute any express statements regarding the owner's or operator's intentions.¹⁰

While the policy suggests that the key determination is whether, at the time of shutdown, the owner or operator intended shutdown to be permanent, in practice, after two years, statements of original intent are not considered determinative. Instead, EPA assesses whether the owner or operator has demonstrated a continuous intent to reopen. To make this assessment, EPA looks at activities during time of shutdown that evidence the continuing validity of the original intent not to permanently shut down.

Thus, to preserve their ability to reopen without a new source permit, EPA believes owners and operators of shutdown facilities must continuously demonstrate concrete plans to restart the facility sometime in the reasonably foreseeable future. If they cannot make such a demonstration, it suggests that for at least some period of the shutdown, the shutdown was intended to be permanent. Once it is found that an owner or operator has no real plan to restart a particular facility, such owner or operator cannot overcome this suggestion that the shutdown was intended to be permanent by later pointing to the

¹⁰ See Memo from John S. Seitz, Director, Stationary Source Compliance Div., OAQPS, to David P. Howekamp, Director, Air Mgt. Div., Region IX (May 27, 1987) (finding shutdown of Noranda Lakeshore Mines' roaster leach plant to be permanent despite express statements from the facility owners that shutdown was temporary, and evidence that the plant was maintained during shutdown); but cf. Memo from John B. Rasnic, Director, Stationary Source Compliance Div., OAQPS, to Douglas M. Skie, Chief, Air Programs Branch (Nov. 19, 1991) (finding reactivation of Watertown Power Plant did not trigger PSD based on the fact that the statements of intent by the owners were supported by documentation regarding maintenance of the facility during shutdown and, as a result, the ability to reactivate the plant easily).

most recent efforts to reopen the facility.¹¹

2. Restart as a Major Modification -- Physical Change

In addition to possibly triggering PSD requirements as a new source, restart of an idle facility may also trigger PSD review if it meets the definition of a major modification. EPA's PSD regulations define "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 CFR § 51.166(b)(2)(i); see also L.A.C. 33:III.509(B).¹²

"Physical change" is not defined in the Clean Air Act or in EPA's PSD regulations. Instead, EPA's regulations describe those activities that are not considered physical changes; most notably, the regulations exclude routine maintenance, repair and replacement. Outside these exceptions, the Agency and courts have interpreted "physical change" broadly. See, e.g., Wisconsin Elec. Power Co. v. Reilly ("WEPCO"), 893 F.2d 901, 908 (7th Cir. 1990) (noting that "courts considering the modification provisions of NSPS and PSD have assumed that 'any physical change' means precisely that").

As a result of this broad statutory definition, most analysis of whether PSD review is triggered under this provision will focus on whether the activities at the facility fit within

¹¹ This approach for assessing the intent of the owner or operator is consistent with the general notion that a company cannot sit indefinitely on a governmental permission to emit air pollution without showing some definite intention to use it. See 40 CFR § 52.21(r) (construction must be commenced within 18 months of receiving a permit); L.A.C. 33:III.509(R); see also In re West Suburban Recycling and Energy Center, L.P., PSD Appeal No. 97-12, slip op. at 8 (EAB, Mar. 10, 1999) (finding PSD permit should be denied because "there is no realistic prospect that the resource recovery facility described in WSREC's permit application will be completed").

¹² Net emissions increases are calculated by combining any increase in actual emissions from a particular physical change or change in the method of operations, with any increase or decrease in actual emissions at the source that are contemporaneous with the particular change and otherwise creditable. 40 CFR § 51.166(b)(3); see also L.A.C. 33:III.509(B). See infra at V.A.4.

one of the regulatory exceptions, in particular the routine maintenance, repair and replacement exception provided in 40 CFR § 50.21(b)(2)(iii)(a). To distinguish between physical changes and work that is routine, "EPA makes case-by-case determinations by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding." WEPCO, 893 F.2d at 910 (quoting Memo from Don R. Clay, Acting Assistant Admin. for Air and Radiation, to David A. Kee, Director, Air and Radiation Div., Region V (Sept. 9, 1988)); see also Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart ("Cyprus Casa Grande Letter") (Nov. 6, 1987) (concluding work conducted at facility was not routine "when viewed as a whole").

3. Restart as a Major Modification -- Change in the Method of Operation

Restart of a long-dormant facility may also be treated as a major modification subject to PSD review if it represents a "change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 CFR § 51.166(b)(2)(i); see also L.A.C. 33:III.509(B). As with the term "physical change," the regulations do not define the meaning of "change in the method of operation" except by listing those activities that do not constitute such changes. 40 CFR § 51.166(b)(2)(iii); see also L.A.C. 33:III.509(B). The most relevant exception for analyzing whether restart of a shutdown facility might be treated as a change in the method of operation is 40 CFR § 51.166(b)(2)(iii)(f); see also L.A.C. 33:III.509(B). This provision exempts from PSD review "[a]n increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or 40 CFR 51.166." 40 CFR § 51.166(b)(2)(iii)(f); see also L.A.C. 33:III.509(B).

The purpose of this "increase in hours" exception was to avoid undue disruption by allowing routine increases in production during the normal course of business in order to respond to market conditions. In the preamble to the PSD rulemaking, EPA explained:

While EPA has concluded that as a general rule Congress intended any significant net increase in such emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to

get an NSR permit before it could lawfully change hours or rate of operation. Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions.

45 Fed. Reg. 52676, 52704 (Aug. 7, 1980). The court in WEPCO explained further, "This exclusion . . . was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification." 893 F.2d at 916 n.11.

Analysis of whether restart of a facility constitutes a mere increase in the hours of operation or production rate must consider whether the proposed activity is of the kind intended to be covered by the provision. Specifically, EPA will look at whether the proposed change requires enhanced flexibility to avoid hampering a company's ability to respond to market fluctuations. In general, reactivation after long periods of shutdown, though obviously motivated by long-term changes in the market, is not a response to the same type of market fluctuations and does not merit the same permitting flexibility envisioned by the regulations.

Restart of a long-dormant facility also may not be entitled to coverage under the "increase in hours" exemption if it would disturb a prior assessment of the environmental impact of the source. In the preamble for the 1980 PSD rulemaking, after expressing its belief that Congress intended to allow certain facilities flexibility to respond to market fluctuations, EPA explained, "At the same time any change in hours or rate of operation that would disturb a prior assessment of a source's environmental impact should have to undergo scrutiny." 45 Fed. Reg. 52676, 52704 (Aug. 7, 1980). As a result, EPA will not exempt increases in the hours of operation in situations where the increase in hours would be prohibited by a permit condition or where the increase would "interfere with a state's efforts in air quality planning" Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987).

In the Cyprus Casa Grande PSD applicability determination, EPA concluded that restart of a roaster/leach/acid ("RLA") plant after 10 years of shutdown constituted a change in the method of operation. EPA distinguished restart of the plant from a mere increase in the hours of operation, explaining that the exemption was not intended to cover restart of facilities after long periods of shutdown. The letter explained:

EPA's original intention to disallow the [increase in hours]

exclusion where it would "disturb a prior assessment of a source's environmental impact" leads me to conclude that the exclusion should not be applied here. This is so because our present assessment as well as that of the State of Arizona, is that the RLA plant in its current non-operating condition has no environmental impact. This is evidenced in part by the removal of the plant from the state's emission inventory and the surrender of operating permits. An additional factor is the simple physical fact that the RLA plant has had zero emissions for ten years.

Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987).

4. Restart as a Major Modification -- Emissions Netting Baseline

Once restart is found to be involve either a physical change or a change in the method of operation, the Agency must determine if the change results in a significant net emissions increase of a pollutant subject to regulation under the Act. 40 CFR § 51.166(b)(2)(i); see also L.A.C. 33:III.509(B). The first step in calculating the net emissions increase is to determine whether the particular physical or operational change in question would itself result in a significant increase in "actual emissions." See 40 CFR § 51.166(b)(3)(i)(a) and (b)(21); see also L.A.C. 33:III.509(B). If so, the second step is to identify and quantify any other prior increases and decreases in "actual emissions" that would be "contemporaneous" with the particular change and otherwise creditable. See 40 CFR § 51.166(b)(3)(i)(b); L.A.C. 33:III.509(B). The third step is to total the increase from the particular change with the other contemporaneous increases and decreases. See 40 CFR § 51.166(b)(3)(i)(b); L.A.C. 33:III.509(B). If the total would exceed zero, then a "net emissions increase" would result from the change. Whether this net emissions increase of a regulated pollutant is "significant" is determined in accordance with the annual tonnage thresholds set forth in 40 CFR § 51.166(b)(23) and L.A.C. 33:III.509(B).

The primary issue in calculating the net emissions increase associated with the restart of a shutdown facility is usually calculation of the actual emissions increase. To calculate the actual emissions increase associated with the change, the emissions from the source after the change is made must be compared to the "baseline emissions" of the source, which are the actual emissions of the source as of a "particular date" (i.e., immediately prior to the physical or operational change in

question). The regulations provide, "In general, actual emission as of a particular date shall equal the average rate . . . at which the unit actually emitted the pollutant during a two-year period which precedes the particular date [the date of the change] and which is representative of normal source operations." 40 CFR § 51.166(b)(21)(ii); see also L.A.C. 33:III.509(B).

The regulations give EPA (or the permitting authority) discretion to set a different period for determining baseline emissions if such a period is more representative of normal source operations. 40 CFR § 51.166(b)(21)(ii); see also L.A.C. 33:III.509(B). EPA, however, has applied its discretion narrowly in assigning representative periods other than the two years immediately preceding the physical or operational change. One exception was provided in the preamble to the 1992 "WEPCO rulemaking." 57 Fed. Reg. 32314, 32325 (July 21, 1992). There EPA said that for utilities it would consider as "representative," actual emission levels from any two years within the five years preceding the physical or operational change.¹³ In that same preamble, however, EPA specifically rejected one commenter's argument that EPA should consider a two-year period within the last five years of a plant's operation as the representative period for plants that have been shut down for more than five years. See 57 Fed. Reg. 32314, 32325 (July 21, 1992).

On more than one occasion, EPA has made clear that in calculating the net emissions increase for reactivation of long-dormant sources potentially subject to PSD, the source is considered to have zero emissions as its baseline. In both the Cyprus Casa Grande applicability determination and the Cyprus Minnesota applicability determination, EPA set the baseline emissions level at zero for facilities that had been shut down or idle for 10 years. See Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987); Memo from John Calcagni, Director, Air Quality Mgt. Div., to David Kee, Director, Air and Radiation Div., Region V ("Cyprus Minnesota") (Aug. 11, 1992). In the Cyprus Minnesota applicability determination, after noting EPA's policy announcement in the WEPCO rulemaking, EPA explained that it has

¹³ See also Memo from John Calcagni, Director, EPA Air Quality Management Div., to David Kee, Director, Air and Radiation Div., EPA Region V (Aug. 11, 1992) (noting that representative period other than previous two years generally limited to catastrophic occurrences); EPA, Draft New Source Review workshop Manual at A.39 (Oct. 1990).

limited flexibility to adjust the "representative period."

For many reactivations of long-shutdown facilities that fall within the definition of a physical or operational change, the only step in calculating "significant net emissions increase" will be a determination of whether the increase in emissions resulting from the change is significant under 40 CFR § 51.166(b)(23)¹⁴ because the baseline for actual emissions will be zero, and there will be no other emissions increases or decreases that are contemporaneous with the change.¹⁵

¹⁴ For Louisiana, the thresholds are provided at L.A.C. 33:III.509(B) in the definition of "significant" and are the same as the federal thresholds relevant here.

¹⁵ As discussed above, the PSD regulations provide that the increase in emissions is determined by subtracting the affected units' pre-change "actual emissions" (referred to above as the "baseline") from their post-change "actual emissions." For units that have not "begun normal operations," the regulations generally provide that actual emissions are equal to the units' "potential to emit." 40 CFR § 51.166(b)(21)(iv). EPA interprets this provision to mean that units which have undertaken a non-routine physical or operational change have not "begun normal operations" within the meaning of the PSD regulations, since pre-change emissions may not be indicative of how the units will be operated following the non-routine change. See 57 Fed. Reg. 32314, 32326 (amending rules only for certain modifications at electric utility steam generating units and reserving "begun normal operations" language for other modifications); 63 Fed. Reg. 39857, 39859 n.4 (July 24, 1998) (post-change emissions of unit following non-routine change is potential to emit). In practice, this provision merely establishes a regulatory presumption that the units will operate at their maximum design capacity following the change. Sources can and frequently do rebut this presumption and avoid PSD applicability. They do so by agreeing to add pollution controls and/or accepting operational restrictions in a "minor NSR" permit or similar instrument that limits their emissions following the change to levels that are not significantly greater than pre-change actual emissions. See 40 CFR § 51.166(b)(4).

Since 1992, EPA regulations have allowed states to adopt a somewhat different approach to determining emissions increases for electric utility steam generating units. See 40 CFR § 51.166(b)(21)(iv), (v). Such units' post-change emissions may be established by a source estimating the future emissions of the unit and submitting to the state information to confirm the

B. Applicability of PSD to Restart of Monroe Plant

1. PSD Applicability Under EPA's Reactivation Policy

Entergy is proposing to restart three units at its Monroe plant that have been placed in "extended reserve shutdown" since July 1, 1988. At the outset, under EPA's Reactivation Policy, because these units have been shut down for more than two years, shutdown of these units is presumed to be permanent. Unless Entergy provides adequate support to rebut this presumption, restart of these units will be treated as activation of a new source subject to PSD. The remainder of this section discusses whether Entergy has adequately demonstrated that the units were never intended to be permanently shut down.¹⁶

Before formally placing the Monroe plant into extended reserve shutdown, then-owner LP&L prepared an Extended Reserve Shutdown Plan dated October 27, 1987, which described plans to maintain the plant in a reserved status to be available when the

accuracy of those estimates. See 40 CFR §§ 51.166(b)(21)(v), (b)(32). However, states and localities are not required to include these special provisions for electric utility steam generating units in their PSD programs. See 40 CFR § 51.166(b) (allowing variations from federal rules when local rules are more stringent). Louisiana has not adopted the special provisions; accordingly, Entergy's post-change emissions will in this case be determined by its potential to emit, rather than by its projections of future emissions. In this case, however, even if Louisiana had adopted the special provisions for utilities, it would not change the outcome. This is so because Entergy has projected, and its proposed title V permit reflects, that it will operate at its full, unrestricted maximum capacity of 8760 hours per year. See Proposed Operating Permit, Monroe Electric Generating Plant, at 15 (General Condition III) (incorporating projected annual and hourly emissions rates).

¹⁶ Entergy has submitted its own self-determination on PSD applicability. Letter from Frank Harbison, Sr. Lead Environmental Analyst, Entergy, to Larry Devillier, Asst. Administrator, LDEQ (Jan. 28, 1999). In addition, Entergy has provided various materials regarding maintenance activities, work needed to bring the plant back on line, permitting activities, and ERS decisionmaking. Letter from Gerald G. McGlamery, Louisiana Enviro. Admin., Entergy, to Hilry Lantz, Air Quality Div., LDEQ (Feb. 3, 1999); Memo from Entergy to EPA, "Actions Taken By Entergy At Monroe Generating Station" (w/ attachments).

demand for electricity increased. This plan included the installation of dehumidification systems, which were subsequently installed, to preserve the electric generation units. At the time of shutdown, at least, it appears that LP&L did not envision a permanent shutdown, but rather a temporary shutdown to respond to market conditions at the time. See Memo from Entergy to EPA, "Actions Taken By Entergy At Monroe Generating Station."

During shutdown, LP&L/Entergy continued to conduct minimum maintenance at the plant. These activities primarily involved responding to problems with the dehumidification system. Entergy has provided maintenance records dating back to May 9, 1988 showing maintenance undertaken at the plant each year throughout the shutdown period and indicating that LP&L/Entergy staff made multiple inspection or maintenance visits to the facility.

During the period of shutdown, LP&L/Entergy also continued to pay annual state air quality maintenance fees. Entergy has provided receipts for these payments for the period October 7, 1988 through August 18, 1998. On December 14, 1995, Entergy applied for a title IV Acid Rain permit, which it received October 23, 1996.

Based on this record it would appear that Entergy did not intend at the time of shutdown, and has never intended, to permanently shut down the Monroe plant. On the other hand, it appears that Entergy has not, until very recently, had definite plans to restart these units.

The Louisiana Public Service Commission ("LPSC"), in a review of whether Entergy had properly included ERS facilities, including the Monroe plant, in its list of "available" facilities,¹⁷ found that Entergy had not adequately demonstrated that these ERS facilities would be returned to service. LPSC, Order No. U-020925-G (Nov. 18, 1998). Specifically, LPSC found that Entergy had not analyzed the costs of returning the ERS units to service, could not give a time frame for returning any

¹⁷ The dispute before the LPSC centered around a tariff agreement between Entergy companies whereby each company had to identify its available capacity and pay or receive compensation according to whether it produced power below or in excess of its listed available capacity. LPSC. Order No. U-020925 at 8-10. The agreement defined a unit as "available" if it was under the control of the system operator, was down for maintenance, or was in extended reserve shutdown with the intent of returning the unit to service at a future date. Id. at 10.

of the units to service beyond saying that they would be needed some time in the next 10 years, and had not made any efforts to confirm that they would be needed in the next 10 years. LPSC concluded that the fees resulting from Entergy's inclusion of the capacity of these ERS facilities could not be justified because Entergy had not made efforts to reach a decision "based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service."

The record before the EPA includes significant circumstantial evidence suggesting that Entergy has never intended the shutdown of the Monroe plant to be permanent. Despite this evidence, however, EPA continues to have serious doubts as to whether Entergy truly intended during much of the 11-year shutdown to expect to use the Monroe plant in the foreseeable future.¹⁸ Because restart of the plant more clearly triggers PSD as a major modification involving a change in the method of operation, EPA does not need to make a final conclusion regarding Entergy's regulatory status under the Reactivation Policy at this time.

2. Physical Changes Triggering PSD

As described previously, changes at a facility may be treated as a major modification subject to PSD review in one of two ways -- changes involving a physical change of the source and changes involving a change in the method of operation at the source. Entergy has submitted a description of the work, and associated costs, being conducted in order to restart the three units at the Monroe plant. The total projected cost is approximately \$5.3 million. Of that, Entergy states that \$1.4 million will be spent on capital improvements. These include replacement of PCB-contaminated transformers, replacement of controls using mercury, and installation of continuous emissions monitoring equipment. The remaining work includes inspection and

¹⁸ The disparity between the company's efforts to maintain the plant to avoid the appearance of permanent shutdown, and its failure to adequately demonstrate to the LPSC its plans to use the plant in the future, highlight one of the weaknesses of EPA's Reactivation Policy in determining the appropriate regulatory treatment of the restart of facilities after a lengthy shutdown. As a result, I have directed my staff to reevaluate EPA's Reactivation Policy to determine if steps can be taken to clarify the circumstances under which restart of a long-dormant source should be subject to new source review as a new source.

cleaning of equipment, some minor repairs of valves and piping, and replacement of auxiliary equipment such as batteries and lab equipment.

Analysis of whether these changes trigger PSD applicability must consider whether, "as a whole," the changes are exempt as routine maintenance, repair and replacement. See 40 CFR § 51.166(b)(2)(iii); L.A.C. 33:III.509(B). In our review of the proposed reactivation of the Cyprus Casa Grande RLA plant EPA explained:

Although the [contractor's] report notes the good condition of the acid plant and characterizes some of the needed work as "minor" or "moderate," viewed as a whole, the minimum necessary rehabilitation effort is extensive, involving replacement of key pieces of equipment . . . and substantial time and cost [(four months and \$905,000)]. In an operating plant some of the individual items of the planned rehabilitation, e.g. painting, if performed regularly as part of a standard maintenance procedure while the plant was functioning or in full working order, could be considered routine. Here, however, this and other numerous items of repair, as well as replacement and installation of new equipment, are needed in order for the RLA plant to begin operation. The fact that the plant requires four months of extensive rehabilitation work despite the adequate maintenance Noranda claims to have undertaken during the shutdown underscores the non-routine nature of the physical change that will occur at the plant.

Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Nov. 6, 1987).

While the activities necessary to restart the Monroe plant might, collectively, appear to be part of a large, non-routine effort, EPA is not, at this time, making a finding as to whether this effort amounts to a physical change of the source. Because restart of the plant most clearly amounts to a change in the method of operation, as described below, EPA need not reach a final conclusion on whether such concentrated efforts without repair or replacement of key pieces of equipment or key components should be considered routine.¹⁹

¹⁹ It is worth noting that while the Cyprus rehabilitation effort included replacement of key pieces of equipment, the rationale for our conclusion in Cyprus Casa Grande turned on the non-routine collection of activities, and not on whether

3. Change in the Method of Operation of the Monroe Plant

For the last eleven years the Monroe plant has been inoperative. To operate the plant now after such a long shutdown constitutes a change in the method of operation within the meaning of the PSD regulations. The mere fact that the plant is changing from a lengthy "non-operational" and "unmanned" condition,²⁰ to one in which the plant is fully operational, fits the common sense meaning of a "change in the method of operation."

The proposed changes in the operation of the plant do not qualify as exempt increases in either the hours of operation or the rate of production, see 40 CFR § 51.166(b)(2)(iii)(f), and L.A.C. 33:III.509(B), because they are not the type of changes intended to be covered by the regulatory exemption. As discussed above, the purpose of the "increase in hours" exception was to provide flexibility to allow sources to adjust their operations to take advantage of currently favorable or changing market conditions without requiring a PSD permit. Restart of the Monroe plant neither calls for the same type of permitting flexibility nor can be considered a response to the kind of short-term, real-time market fluctuations envisioned by EPA in adopting the exemption.

This is not a situation where the sources's ability to plan ahead for permitting is constrained by the need for quick responses to short-term changes in the market. In its own analysis of PSD applicability, Entergy notes that unlike normal work outages where overtime is required to get the plants operational again, repairs at the Monroe plant will be conducted using "straight time" because "there will be no need to have the units available for dispatch in a short time frame." Memo from Mark G. Adams, Entergy to Myra Costello, Entergy (Aug. 3, 1998). Further, unlike the situations envisioned by the exemption, restart of a long-dormant facility involves permits for more than

individual activities were themselves routine or non-routine.

²⁰ In a 1994 letter to LDEQ, Entergy states that as a result of placing the plant in ERS status in 1988, "[the] plant is non-operational and unmanned." Letter from Entergy to Cheryl LeJeune, Office of Water Resources, LDEQ (July 18, 1994). Entergy also noted that, "It has not generated electricity for six years and has not operated on a routine basis since 1981." Letter from Entergy to Jayne Fontenot, Chief, Permits Issuance Section, EPA, Region VI (July 18, 1994).

just air releases. Entergy has budgeted over \$175,000 to obtain all of the necessary permits including a new water discharge permit to reflect the change from inoperation. Where a facility requires numerous permits to once again operate, PSD permit review is no longer the solitary hindrance that the exemption was designed to avoid.

EPA also believes the decision to operate after eleven years of shutdown, while certainly motivated by changes in the marketplace, is not the kind of quick decision to respond to quick market fluctuations that EPA intended to allow without the burden of the PSD permitting process. In the WEPCO rulemaking, EPA discussed its view of the time period in which one would expect to see the effect of market fluctuations for the utility sector:²¹

By presumably allowing a utility to use any 2 consecutive years within the past 5, the rule better takes into consideration that electricity demand and resultant utility operations fluctuate in response to various factors such as annual variability in climatic or economic conditions that affect demand, or changes at other plants in the utility system that affect the dispatch of a particular plant. By expanding a baseline for a utility to any consecutive 2 in the last 5 years, these types of fluctuations in operations can be more realistically considered, with the result being a presumptive baseline more closely representative of normal source operation.

57 Fed. Reg. 32314, 32325 (July 21, 1992). The eleven-year shutdown of the Monroe plant is well beyond the period in which one would expect to see changes in operation in response to the kind of market fluctuations addressed by the "increase in hours" exception. The decision to restart the plant after such a long period is a more fundamental change in the way the company has done and plans to do business. Entergy's decision to restart the Monroe plant looks less like a quick decision to take advantage of market conditions at an already-operational plant and more like a decision to begin operation of a source that has not previously participated in the market.

EPA has also made clear that the "increase in hours"

²¹ EPA's comments were made in the context of describing the representative period for determining baseline emissions from utilities, but the analysis of what constitutes normal operations is equally relevant to the discussion here.

exemption is not available where it would "disturb a prior assessment of a source's environmental impact." For the last eleven years, the State has carried the Monroe plant in its emissions inventory with zero actual emissions. From all accounts, the State has treated the plant as having no environmental impact. Restart of the plant would disturb this assessment and is not, therefore, entitled to the "increase in hours exemption."

The State's assessment of the plant's environmental impact is further demonstrated by the State's submittal for the Ozone Transport Assessment Group ("OTAG") modeling effort to assess interstate NOx transport contributions to ozone nonattainment in downwind States. In late 1995, 37 States including Louisiana, provided their emissions inventories to EPA for modeling and analysis. Fifteen of those 37 States (including Louisiana) claimed that actual emissions from sources in their State had no impact on downwind ozone nonattainment. In 1995, the Monroe plant was included in the State's emissions inventory and was still included in that inventory as having zero emissions when the ultimate transport analysis was concluded in 1997. OTAG used this inventory data to project emissions contributions and nonattainment problems throughout the 37-State region through 2007. During this modeled period, emissions from the Monroe plant were assumed to be zero. Based in large part upon OTAG's modeling results, EPA declined to require Louisiana to revise its SIP as part of the recent "NOx SIP Call."²² EPA concluded that the weight of evidence did not support a finding that Louisiana made a significant contribution to downwind nonattainment. See, 62 Fed. Reg. 60318, 60340 (Nov. 7, 1997), 63 Fed. Reg. 57356, 57398 (Oct. 27, 1998).²³

²² The Court of Appeals for the D.C. Circuit has stayed the SIP Call pending further order by the court. State of Michigan v. EPA, No. 98-1497 (D.C. Cir. Order filed May 25, 1999).

²³ EPA conducted subsequent modeling efforts to evaluate the costs and air quality impacts associated with the proposed NOx SIP Call controls. This modeling did not rely on state inventory data. Instead, the approach looked at Energy Information Administration data regarding available power plants, and projected emissions based on future demand and likely order of dispatch (considering factors such as the plant's age and fuel type). This approach predicted future NOx emissions from Unit 12 of the Monroe plant of 148 tons per year. This amount of emissions corresponds to approximately 550 hours of full-load operation per year at Unit 12. Such minimal operations do not

EPA believes restart of the Monroe plant will constitute a change in the method of operation that is not otherwise exempted by the PSD regulations. The only possible exemption, the "increase in hours" exemption, simply was not intended to cover this kind of change. As a result, EPA must next consider whether the change in the method of operation will result in a significant net emissions increase, thereby triggering PSD applicability as a major modification.

4. Calculating Net Emissions Increase

Restart of the Monroe plant will result in emissions of NOx, SO2, CO, PM10 and VOC. As discussed previously, the emissions baseline for long-dormant sources such as the Monroe plant are generally considered to be zero. EPA believes the zero emissions baseline is representative of normal source operations at the Monroe plant, which has had no emissions for the last eleven years.

The following table lists the significance levels, see 40 CFR § 51.166(b)(23)(i) and L.A.C. 33:III.509(B), in tons per year for each of the pollutants that could be emitted upon restart of the Monroe plant. In addition, the table lists Entergy's potential to emit (assuming full-time operation, as is reflected in the proposed operating permit) for these same pollutants. The potential to emit is assumed to be the source's "actual emissions" following the change in the method of operation. See note 16, supra.

POLLUTANT	SIGNIFICANCE LEVEL (TPY)	POTENTIAL TO EMIT (TPY)
NOx	40	4,972.65
SO2	40	679.84
CO	100	361.65
PM10	15	32.46
VOC	40	12.74

With the exception of VOC, restart of the Monroe plant will result in a significant emissions increase over its current zero emissions baseline for each of the listed pollutants.

The regulations define the contemporaneous period as ex-

alter EPA's conclusions. No emissions were projected for any of the other units at the plant.

tending back five years from the physical or operational change. No changes in emissions at the Monroe plant have been made during last 5 years because it has been shut down during this entire period. As a result there have been no increases or decreases in emissions that are contemporaneous with the change. See 40 CFR § 51.166(b)(3)(ii); L.A.C. 33:III.509(B). Therefore, the net emissions increases from start-up of the Monroe plant would be approximately those stated in the chart above. Hence, EPA agrees with Petitioner that the title V permit for the Monroe plant should be revised to assure compliance with the Louisiana SIP PSD requirements because start-up of the plant would be subject to PSD as a major modification under the Clean Air Act, 40 CFR § 51.166, and L.A.C. 33:III.509(B).

V. NSPS APPLICABILITY

Petitioner claims that the maximum capacity of the affected facilities at the Monroe plant may have been increased by some unknown method at some time between 1976 and the time of the title V application without being subject to NSPS review. Petitioner points to differences in reported emission capacities that suggest a modification has occurred at the Monroe plant. In the April 27, 1976 compliance report from the City of Monroe to the Louisiana Air Control Commission, the total capacity of the Monroe plant was reported as 1365 MMBtu/hr. In the September 18, 1996 title V permit application, however, Entergy reports the Monroe plant's capacity as 1961 MMBtu/hr. While EPA believes that Entergy has adequately explained this discrepancy in reported capacities (see below), EPA nonetheless evaluates in this section whether the changes to the Monroe plant might otherwise be subject to NSPS.

Section 111 of the Clean Air Act requires EPA to adopt standards of performance for stationary sources constructed or modified after the date the standards are proposed. CAA §§ 111(a)(2), (3) and (b)(1); see also 40 CFR § 60.1.²⁴ Unlike the PSD program, reactivation of long-dormant facilities is not considered construction of a new source. See Memo from Edward E. Reich, Dir., Div. Of Stationary Source Enf., to Sandra S. Gardebring, Dir., Region V Enf. Div. (Oct. 30, 1980). Installation of Units 10, 11 and 12 occurred prior to adoption of

²⁴ Louisiana has adopted the federal NSPS regulations by reference. See L.A.C. 33:III.3003(A). For purposes of this section, only the federal regulations are cited.

all NSPS regulations.²⁵ Thus, to determine NSPS applicability for restart of the Monroe plant, EPA need only consider whether the affected facilities have been modified or reconstructed. See 40 CFR §§ 60.14 and 60.15.

A "modification" for purposes of NSPS applicability is defined as:

[A]ny physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.

40 CFR § 60.1. As with PSD, the analysis of whether an activity constitutes a modification is a two-part test. The first step -- identifying a physical or operation change -- is similar to the first step for finding a PSD modification. The second step of the NSPS analysis -- finding an emissions increase -- differs from the emission netting step of PSD.

To find an increase in emissions, EPA compares the hourly emissions capacity of an affected facility before and after the change. See 40 CFR § 60.14; see also WEPCO, 893 F.2d at 913. The changes at the Monroe plant do not appear to be of the type that would increase the hourly emissions capacity of the affected facilities. As described above, the major work being performed at the Monroe plant appears to involve upgrading certain controls, replacing PCB-containing transformers and some repairs and maintenance of the boilers and associated auxiliary equipment. Based on the information currently before it, EPA believes the affected facilities could operate at the projected capacities with or without the changes that have occurred at the source. If, after further investigation, EPA finds that changes to the facility in fact will increase the emissions capacity of the affected facilities, EPA will revisit the question of NSPS applicability.

In response to Petitioner's claims that reported emissions capacities had increased, Entergy explained that values derived from fuel consumption in 1975 were erroneously reported as

²⁵ The first NSPS for fossil-fuel-fired steam generators applied to sources for which construction was commenced after August 17, 1971. 40 CFR, Part 60, subpart D.

maximum heat input values and appeared to be less than those stated in the permit application. Entergy's explanation appears to be confirmed by reference to specification sheets for the boilers. Because the manufacturer's specification sheets for the boilers reflect the same heat input values as represented in the permit application, EPA concludes that, standing alone, the differences in the reported emissions capacities, do not demonstrate a change in the emissions capacity of the affected facilities.

NSPS may also be triggered, irrespective of changes in emission capacities, if the changes to the affected facility amount to reconstruction of the facility. 40 CFR § 60.15(b). A facility is considered to be reconstructed when the represented fixed capital costs of new replacement components to reactivate the facility exceed 50% of the fixed capital costs required to construct a comparable new facility. 40 CFR § 60.15(b). Here, Entergy has projected the total cost (capital and O&M) to restart all affected facilities at the Monroe plant will be approximately \$5.3 million. Entergy estimates approximately \$1.4 million of these costs will be capital expenditures. Of these capital expenditures, it appears that at least half relate to replacement of PCB-containing transformers and thus do not relate to changes to the affected facilities. Given the small capital costs associated with reactivation of the affected facilities, it does not appear that the restart activities at the Monroe plant would trigger NSPS based upon a reconstruction analysis.

VI. RCRA DISPOSAL REQUIREMENTS

Entergy's permit application contains reference to two different procedures to remove iron oxide and copper from the boilers. One procedure involves using up to 30,000 pounds of ethylenediaminetetraacetic acid ("EDTA"). Spent boiler cleaning solutions containing this chemical and scavenged metals are injected into the boiler for combustion. The Petitioner claims that Entergy's permit application does not contain sufficient information concerning the analysis of typical spent boiler cleaning solutions nor citation to any regulatory provision that would exempt boiler cleaning solutions from RCRA disposal regulations. The Petitioner further asserts that if the spent boiler cleaning solutions exhibit RCRA hazardous waste characteristics, disposal would be prohibited unless the facility obtains a RCRA permit, became regulated under EPA's Boiler and Industrial Furnace regulations, or otherwise demonstrated that the spent boiler cleaning solution complied with EPA's "comparable fuels" specification.

To justify exercise of an objection by EPA to a title V permit pursuant to section 505(b)(2) of the Act, the Petitioner must demonstrate that the permit is not in compliance with the requirements of the Clean Air Act, including the requirements of the Louisiana SIP. RCRA requirements are not applicable requirements of the Act. See 40 CFR § 70.2. Therefore, this issue cannot be addressed as part of the petition process. However, the emissions themselves would be regulated under Louisiana's Air Quality regulations and federal/state hazardous waste requirements.

Under Louisiana Air Permit General Condition XVII, Entergy must submit any small emissions (generally less than 5 tpy in total) resulting from routine operations that are predictable, expected, periodic, and quantifiable to the Louisiana Air Quality Division for approval as authorized emissions. If the emissions are considered non-routine, Entergy must apply for a variance under L.A.C. 33.III.917. Thus, the emissions from the combustion of the spent boiler cleaning solutions are regulated under Louisiana's air quality regulations. In addition, if the spent boiler cleaning solution were to exhibit RCRA hazardous waste characteristics, Entergy would be required to comply with all applicable federal and state hazardous waste management requirements.

VII. CONCLUSION

For the reasons set forth above, I find that the proposed title V permit fails to assure compliance with applicable PSD requirements set forth in the Louisiana SIP. As a result, I partially grant the February 9, 1999 petition requesting that the Agency object to the proposed Entergy permit, and I hereby object to issuance of the proposed Entergy Permit. I deny the remainder of the February 9, 1999 petition. Pursuant to section 505(b) of the Act and 40 CFR § 70.8(d), LDEQ shall not issue the permit unless it is revised in accordance with this Order.

Date:

Carol M. Browner
Administrator

Exhibit 1
Attachment 10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
SEP 6 1978

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: PSD Requirements

FROM: Director
Division of Stationary Source Enforcement

TO: Stephen A. Dvorkin, Chief
General Enforcement Branch
Region II

In response to your memo dated June 29, 1978, we have consulted with the Offices of General Counsel and Air Quality Planning and Standards and provide the following responses to your questions regarding the applicability of several PSD requirements.

Q - 1(a). Is a source which shut down approximately four years ago because of an industrial accident, and which was not and is not required to obtain a permit under a SIP, subject to the requirements of PSD? This source was not subject to PSD requirements prior to March 1, 1978.

A - This is a question which we have not previously addressed, but we believe that EPA policy should be as follows. A source which had been shut down would be a new source for PSD purposes upon reopening if the shutdown was permanent. Conversely, it would not be a new source if the shutdown was not permanent. Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not

permanent, and of overcoming any presumption that it was. Under the facts you have given us, we would presume that the shutdown was permanent, since it has already lasted about four years. Consequently, unless the owner or operator of the source were to rebut that presumption, we would treat the source as a new source for PSD purposes.

We assume that your statement that the source was not subject to the PSD regulations in effect before March 1, 1978, means that it was not in one of the nineteen source categories listed in Section 52.21(d) (1) of those regulations. A proposed new source which was not in one of those categories would be subject to the PSD regulations promulgated on June 19, 1978, unless (1) all required SIP permits had been obtained by March 1, 1978, and (2) construction commences before March 19, 1979, is not discontinued for 18 months or more and is completed within a reasonable time. See Section 52.21(i) (3), 43 FR 26406. Here, all required SIP permits were obtained by March 1, since none was required. Consequently, the source would not be subject to the new regulations, assuming that the reopening is commenced before March 19, 1979, is not discontinued for more than 18 months and is completed within a reasonable time.

If we were to treat the source as an existing source for PSD purposes, we would also conclude that it is not subject to the new regulations. [SEE FOOTNOTE 1] No source on which construction commenced before June 1, 1975, would be subject to those regulations. [SEE FOOTNOTE 1] See Clean Air Act Sections 168(b), 169(4); 40 CFR 52.21(d) (1) (1977). Here, since the source was in operation about 4 years ago, construction on it presumably commenced before then, well before June 1, 1975. Hence, it would (presumably) not be subject to the new regulations.

Q - 1(b). Would your answer to 1.a., above, change if the source is or was required to obtain a SIP permit?

A - If the source shut down temporarily, it would not be required to obtain a PSD permit in order to start up.

[FOOTNOTE 1] Application of this rule requires special guidance for multifacility sources which construct in phases. Generally, if one phase of a multifacility source commenced construction by June 1, 1975, all other mutually dependent phases specifically approved for construction at the same time will also be "grandfathered". On the other hand, each independent facility must have commenced construction individually by June 1, 1975, to have achieved grandfather status. See 43 FR 26396, 19 June 1978.

On the other hand, if the source shut down permanently, it would, upon reopening, be required to obtain a PSD permit unless the following two conditions were met: 1) the SIP permit was obtained prior to 3/1/78 and 2) any construction necessary for reopening is commenced prior to 3/19/79, is not discontinued for 18 months or more and is completed within a reasonable time.

Q - 2. Is the EPA required in all cases to forebear from issuing a PSD permit until a SIP permit has been issued or is such forbearance required only when the source is subject to the "Interpretative Ruling" (41 FR 55524, December 21, 1976)?

A - EPA should refrain from issuing a PSD permit prior to issuance of a SIP permit only in cases where the source is also subject to the Interpretative Ruling. (See 43 FR 26402, column 3.)

Q - 3. In the evaluation of BACT, does equipment reliability play a part, i.e., should a unit capable of 80% control with a 20% downtime, be preferred to a unit capable of 90% control with a 35% downtime? Can backup equipment be required for BACT purposes?

A - Questions concerning BACT should be addressed to the Control Programs Development Division in Durham, N.C.

Q - 4. For the purpose of determining what constitutes "air pollution control equipment," what is meant by the phrase "... normal product of the source or its normal operation"? (43 FR 26392, mid. col., June 19, 1978). Does that refer to the quantity or quality of the product or both, i.e., if a baghouse collects 100% of the product, a settling chamber collects 20%, and without some device no product is collected, what is deemed to be "air pollution control equipment"?

A - If a source (such as one which produces zinc-oxide) cannot capture any of its product without the use of some type of control device, the least efficient control device used in the industry will be considered vital to the process. For example, if sources in such an industry typically employ either settling chambers or baghouses, potential emissions will be calculated as the emissions from such a source with a settling chamber installed.

Q - 5. Do the provisions of Section 167 of the Clean Air Act, which refer to issuance of an Order and seeking injunctive relief for PSD violations, create enforcement authorities independent of those created in Section 113 for SIP violations, or do they simply incorporate Section 113 by reference?

A - We believe that Section 167 provides the Agency with enforcement authority which

guidance on implementation of Section 167. This guidance should be completed shortly. In the interim, the Agency should enforce against violations of the PSD requirements under the mechanisms established by Section 113, generally. There is one important situation, however, in which resort to Section 167 may be necessary. This would occur when a state had issued a permit that EPA considered to be invalid. In this situation, we believe that Section 167 provides the Agency with the authority to halt the construction of the source directly, without first having to resort to the cumbersome process of seeking a judicial declaration that the state permit is invalid. (See 42 FR 57473 (1977)). In this respect, Section 167 provides the agency with authority similar to that provided by section 113(a) (5) and (b)(5) to prevent sources with invalid permits from constructing in nonattainment areas. Please note, however, that no delegations for enforcement of the PSD requirements have been signed yet, and so any action under Section 167 would have to be taken in close coordination with DSSE, and any Section 167 orders would have to be signed by the Administrator.

If you have any further questions on these issues, please contact Libby Scopino at FTS 755-2564.

Edward E. Reich

Exhibit 1
Attachment 11

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
August 8, 1980

Office of
Enforcement

MEMORANDUM

SUBJECT: PSD Applicability Determination: Babylon 2

FROM: Edward E. Reich (EN 341)
Director, Stationary Source Enforcement Division

TO: William K. Sawyer, Attorney
General Enforcement Branch, Region II

This is in response to your memo dated July 28, 1980, concerning the Babylon incinerator #2. Babylon #2 is a municipal incinerator capable of charging more than 250 tons of refuse per day and will have the potential to emit greater than 100 tons per year of particulate matter. The incinerator has been shutdown since 1975 and has been removed from the state's emission inventory. The source now wishes to reopen and the question is what are the implications as to the PSD permitting requirements.

Consistent with an earlier determination dated September 6, 1978, (copy attached), a source which has been shut down would be a new source for PSD purposes upon reopening if the shutdown was permanent. Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. Under the facts you have given us, we would presume that the shutdown was permanent, since it has lasted for five years, and the State has removed the incinerator from its emissions inventory. Consequently unless the owner or operator of the source were to rebut that presumption, we would treat the source as a new source (or modification if it occurs at an existing major source) for PSD purposes. Babylon #2 will be required to meet the BACT standards, but will not necessarily have to meet a limit at least as stringent as 40 CFR 60.52, unless this facility is itself subject to the requirements of NSPS. BACT sets NSPS as the minimum level of control when such source is subject to the NSPS. This means that the individual source would have to be subject to NSPS not just that NSPS applies to the source category.

This response was completed with the concurrence of the Office of General Counsel, should you have any additional questions or comments, please contact Janet Littlejohn EN-341.

[SIGNED BY WILLIAM J. JOHNSON]
Edward E. Reich

cc: Peter Wyckoff
Jim Weigold

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

DATE: AUG 7 1980

SUBJECT: Memo Dated July 28, 1980 from William Sawyer to Edward Reich
Concerning Applicability of PSD Regulations to the Babylon #2 Incinerator

FROM: Charles S. Warren
Regional Administrator

TO: Richard D. Wilson (EN-339) Michael James (A-133) Deputy Assistant
Administrator for Associate General C.
General Enforcement Air, Noise & Radiation Division

Region II is conducting negotiations with the town of Islip and the New York State Department of Environmental Conservation on the issue of re-opening several incinerators to burn solid waste presently being disposed of in a local landfill. Pursuant to these negotiations, William Sawyer of the Enforcement Division in Region II has communicated by telephone with Rich Biondi and Janet Littlejohn, both of the Division of Stationary Source Enforcement, as well as to Edward Reich by the above-referenced memorandum. The issue he has raised is whether one of the incinerators (Babylon #2) will be required to meet PSD regulations upon reopening. We are operating under serious time constraints since the landfill is a severe health and environmental hazard. I hope that we will be able to receive a determination from headquarters on this issue by no later than Monday, August 11.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.20460

SEP 6 1978

OFFICE OF
ENFORCEMENT

SUBJECT: PSD Requirements

FROM: Director
Division of Stationary Source Enforcement

TO: Stephen A. Dvorkin, Chief
General Enforcement Branch
Region II

In response to your memo dated June 29, 1978, we have consulted with the Offices of General Counsel and Air Quality Planning and Standards and provide the following responses to your questions regarding the applicability of several PSD requirements.

Q - 1(a). Is a source which shut down approximately four years ago because of an industrial accident, and which was not and is not required to obtain a permit under a SIP, subject to the requirements of PSD? This source was not subject to PSD requirements prior to March 1, 1978.

A - This is a question which we have not previously addressed, but we believe that EPA policy should be as follows. A source which had been shut down would be a new source for PSD purposes upon reopening if the shutdown was permanent. Conversely, it would not be a new source if the shutdown was not permanent. Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent, and of overcoming any presumption that it was. Under the facts you have given us,

we would presume that the shutdown was permanent, since it has already lasted about four years. Consequently, unless the owner or operator of the source were to rebut that presumption, we would treat the source as a new source for PSD purposes.

We assume that your statement that the source was not subject to the PSD regulations in effect before March 1, 1978, means that it was not in one of the nineteen source categories listed in Section 52.21(d) (1) of those regulations. A proposed new source which was not in one of those categories would be subject to the PSD regulations promulgated on June 19, 1978, unless (1) all required SIP permits had been obtained by March 1, 1978, and (2) construction commences before March 19, 1979, is not discontinued for 18 months or more and is completed within a reasonable time. See Section 52.21(i) (3), 43 FR 26406. Here, all required SIP permits were obtained by March 1, since none was required. Consequently, the source would not be subject to the new regulations, assuming that the reopening is commenced before March 19, 1979, is not discontinued for more than 18 months and is completed within a reasonable time.

If we were to treat the source as an existing source for PSD purposes, we would also conclude that it is not subject to the new regulations. [SEE FOOTNOTE 1] No source on which construction commenced before June 1, 1975, would be subject to those regulations. [SEE FOOTNOTE 1] See Clean Air Act Sections 168(b), 169(4); 40 CFR 52.21(d) (1) (1977). Here, since the source was in operation about 4 years ago, construction on it presumably commenced before then, well before June 1, 1975. Hence, it would (presumably) not be subject to the new regulations.

Q- 1(b). Would your answer to 1.a., above, change if the source is or was required to obtain a SIP permit? A- If the source shut down temporarily, it would not be required to obtain a PSD permit in order to start up.

[FOOTNOTE 1] Application of this rule requires special guidance for multifacility sources which construct in phases. Generally, if one phase of a multifacility source commenced construction by June 1, 1975, all other mutually dependent phase specifically approved for construction at the same time will also be "grandfathered". On the other hand, each independent facility must have commenced construction individually by June 1, 1975, to have achieved grandfather status. See 43 FR 26396, 19 June 1978.

On the other hand, if the source shut down permanently, it would, upon reopening, be required to obtain a PSD permit unless the following two conditions were met: 1) the SIP permit was obtained prior to 3/1/78 and 2) any construction necessary for reopening is commenced prior to 3/19/79, is not discontinued for 18 months or more and is completed within a reasonable time.

Q - 2. Is the EPA required in all cases to forebear from issuing a PSD permit until a SIP permit has been issued or is such forbearance required only when the source is subject to the "Interpretative Ruling" (41 FR 55524, December 21, 1976)?

A - EPA should refrain from issuing a PSD permit prior to issuance of a SIP permit only in cases where the source is also subject to the Interpretative Ruling. (See 43 FR 26402, column 3.)

Q - 3. In the evaluation of BACT, does equipment reliability play a part, i.e., should a unit capable of 80% control with a 20% downtime, be preferred to a unit capable of 90% control with a 35% downtime? Can backup equipment be required for BACT purposes?

A - Questions concerning BACT should be addressed to the Control Programs Development Division in Durham, N.C.

Q - 4. For the purpose of determining what constitutes "air pollution control equipment," what is meant by the phrase "... normal product of the source or its normal operation"? (43 FR 26392, mid. col., June 19, 1978). Does that refer to the quantity or quality of the product or both, i.e., if a baghouse collects 100% of the product, a settling chamber collects 20%, and without some device no product is collected, what is deemed to be "air pollution control equipment"?

A - If a source (such as one which produces zinc-oxide) cannot capture any of its product without the use of some type of control device, the least efficient control device used in the industry will be considered vital to the process. For example, if sources in such an industry typically employ either settling chambers or baghouses, potential emissions will be calculated as the emissions from such a source with a settling chamber installed.

Q - 5. Do the provisions of Section 167 of the Clean Air Act, which refer to issuance of an Order and seeking injunctive relief for PSD violations, create enforcement authorities independent of those created in Section 113 for SIP violations, or do they simply incorporate Section 113 by reference?

A - We believe that Section 167 provides the Agency with enforcement authority which

is not necessarily otherwise provided by Section 113. The Office of Enforcement is drafting guidance on implementation of Section 167. This guidance should be completed shortly. In the interim, the Agency should enforce against violations of the PSD requirements under the mechanisms established by Section 113, generally. There is one important situation, however, in which resort to Section 167 may be necessary. This would occur when a state had issued a permit that EPA considered to be invalid. In this situation, we believe that Section 167 provides the Agency with the authority to halt the construction of the source directly, without first having to resort to the cumbersome process of seeking a judicial declaration that the state permit is invalid. (See 42 FR 57473 (1977)). In this respect, Section 167 provides the agency with authority similar to that provided by section 113(a) (5) and (b)(5) to prevent sources with invalid permits from constructing in nonattainment areas. Please note, however, that no delegations for enforcement of the PSD requirements have been signed yet, and so any action under Section 167 would have to be taken in close coordination with DSSE, and any Section 167 orders would have to be signed by the Administrator.

If you have any further questions on these issues, please contact Libby Scopino at FTS 755-2564.

Edward E. Reich

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC20460
OFFICE OF THE GENERAL COUNSEL

DATE: February 14, 1973

FROM: Michael A. James, Attorney
Air Quality and Radiation Division

MEMORANDUM OF LAW

FACTS

Your memorandum of February 2, 1973, briefly discusses the issue of the reopening of existing plants which have been closed for a period of time. Some have closed because of lack of demand for their products, others operate on a seasonal basis. You have inquired regarding the applicability of new source performance standards to these sources.

QUESTION

May a source which was in existence prior to the proposed date of a new source performance standard (applicable to that class of sources) be subjected to the standard when it resumes operations following the proposal?

ANSWER

No, the source would not be a "new source" within the meaning of section 111 (a) (2) of the Clean Air Act.

DISCUSSION

The sources which your memorandum describes are "existing sources", not "new sources" which may be regulated under Section 111. The section defines "new source" as follows:

[A]ny stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposal regulations) presuming a standard of performance under this section which will be applicable to such source.

Under the facts given it [ILLEGIBLE] struction" activity is [ILLEGIBLE] to plant to its former operating condition and we do not think this could legitimately be characterized as "fabrication, erection, or installation of an affected facility".(See Footnote *) In addition, no modification within the meaning of the section is involved, since it appears that neither the source's physical structure nor its method of operation is changed from its condition under previous operations.

[FOOTNOTE *]:Which is the definition of "construction" under EPA regulation 40 CFR 60.2 (g).

Exhibit 1

Attachment 12

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 27 1987

MEMORANDUM

SUBJECT: Reactivation of Noranda Lakeshore Mines' RLA Plant and PSD Review

FROM: John S. Seitz, Director Stationary Source Compliance Division
 Office of Air Quality Planning and Standards

TO: David P. Howekamp, Director Air Management Division, Region IX

Pursuant to your recent request, this memorandum addresses the status of Noranda Lakeshore Mines' roaster leach acid (RLA) plant in Arizona. Noranda is contemplating startup of the RLA plant which has been shut down since 1977. The company contends that the shutdown was not intended to be permanent, and therefore believes that the plant should not be subject to PSD review.

Whether or not a source which has been shut down is subject to PSD review upon reactivation depends on whether the shutdown is considered permanent. EPA evaluates permanence of shutdowns based on the intent of the owner or operator. The facts and circumstances of the particular case, including the duration of the shutdown and the handling of the shutdown by the State, are considered as evidence of the owner or operator's intent. This decision making framework follows the policy on plant reactivation which EPA set forth in 1978. The September 6, 1978 memorandum which initiated this policy states: "A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have

the burden of showing that the shutdown was not permanent, and of overcoming any presumption that it was." Several memoranda later issued by SSCD (August 8, 1980; October 3, 1980; July 9, 1982) applied this shutdown/reactivation policy.

In the case of Noranda's RLA plant, your staff has provided the following information. The RLA plant, previously owned by Hecla Mining Company, was shut down by Hecla in 1977 due to market conditions. Reports issued by Hecla at the end of 1977 stated that the ALA facility could be operational within one week. However, due to poor economic conditions Hecla decided to terminate their lease for the ALA plant. In 1979 Noranda purchased the facility, but never operated the ALA plant due to similar economic problems; the ALA plant itself has not operated since 1977. The ALA plant was deleted from Noranda's operating permits in 1980, and Noranda's remaining operating permits were surrendered in 1984. In 1986, the ALA plant was removed from the State's emission inventory. Your staff has also indicated that the roaster may need at least several hundred thousand dollars worth of work before being operable, and could not come on line for approximately four months.

Since the ALA plant has been shut down for well over 2 years and has been removed from the State's emission inventory, EPA presumes that the shutdown was permanent. However, Noranda has submitted documentation to Region 9 seeking to demonstrate that the shutdown was not intended to be permanent. Included is a 1980 statement of intent for long term operation of the facility, evidence of some search for toll concentrates of sufficient quality to allow operation, and evidence of some level of custodial maintenance. The question which now arises is whether the information submitted is sufficient to rebut the presumption of a permanent shutdown.

EPA evaluates the permanence of the shutdown based on the demonstrated intent of the owner or operator to reopen the source. Facts and circumstances surrounding the shutdown, including duration of the shutdown and the handling of the shutdown by the source and State, are evidence of the owner's intent. In Noranda's case, the significant amount of time that has elapsed, as well as Noranda's failure to maintain the operating permit, removal of the ALA plant from the emissions inventory, and the time and capital that must be invested in the rehabilitation of the plant in order to make it operable, are evidence that the shutdown was intended to be permanent.

There is not sufficient evidence of intent to reopen the source to regard this as a temporary shutdown. Therefore, SSCD concurs with Region 9's determination that the source, for PSD purposes, is permanently shut down, and must meet Federal PSD requirements for construction and operation.

If You have any questions, please contact Sally M. Farrell at FTS 382- 2875.

cc: Wayne Blackard, Region IX
Nancy Harney, Region IX
Bruce Armstrong, OPAR
NSR Contacts

Exhibit 1
Attachment 13

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
215 Fremont Street
San Francisco. Ca. 94105

November 6, 1987

Robert T. Connery, Esq.
Holland & Hart
P. O. Box 8749
Denver, Colorado 80201

Re: Supplemental PSD Applicability Determination Cyprus
Casa Grande Corporation Copper Mining and Processing
Facilities

Dear Mr. Connery:

This is a supplemental determination regarding the applicability of prevention of significant deterioration (PSD) provisions under sections 160-169 of the Clean Air Act, 42 U.S.C §9 7470-7479, and EPA's PSD regulations, 40 C.F.R. S 52.21 to the above-referenced facility, located near Casa Grande, Arizona. This determination supplements the determination set forth in a May 27, 1987 Memorandum from John S. Seitz, Director, Stationary Source Compliance Division, EPA, and in my May 29, 1987 letter to Roger M. Ferland, Streich, Long, Weeks and Cardon, Phoenix, Arizona, attorney for Noranda Lakeshore Mines, Inc., which formerly controlled the Casa Grande facility. For the reasons discussed below, EPA today (1) reaffirms and incorporates by reference herein its earlier determination that reactivation of the Roaster/Leach/Acid (RLA) plant at the Casa Grande facility would constitute a major -new source within the meaning of Part C of the Clean Air Act and EPA's regulations issued thereunder; and (2) determines that even if the reactivated RLA plant would not be subject to PSD as a new source, the start-up would also constitute a major modification for PSD purposes. Accordingly, Cyprus Casa Grande Corporation (Cyprus) must obtain a PSD permit before beginning construction on any of the rehabilitation activities necessary for start-up of the RLA plant.

1. THE NEED FOR THIS SUPPLEMENTAL DETERMINATION

The earlier applicability determination by Mr. Seitz and myself was in response to requests by Noranda that focused exclusively on the question whether start-up of the RLA plant would render the facility subject to PSD as a major new source pursuant to EPA's shutdown/reactivation policy. My review of

the administrative record of that matter has confirmed that Noranda did not request EPA to consider, and EPA did not consider, whether the RLA plant would be subject to PSD upon reactivation as a major modification under the Act and the PSD regulations.

Following EPA's earlier determination, Noranda transferred its interest in the facility in question, including the RLA plant, to Cyprus. Cyprus then sought review of EPA's determination in the court of appeals. Cyprus Casa Grande Corp. v. EPA, No. 87-7322 (9th Cir.). In a Civil Appeals Docketing Statement filed with the Ninth Circuit on July 30, 1987, Cyprus identified under category I., "Issues to be Raised on Appeal," the following item:

(2) Whether Petitioner's existing RLA plant has been subject to a "major modification," 40 C.F.R. § 52.21(b)(2), which would require a PSD preconstruction permit.

Thus, it is clear that if this matter is adjudicated by the court of appeals, it likely would raise issues beyond the scope of the consideration previously given by EPA and Noranda. This in turn raises the distinct possibility that litigation based on EPA's prior determination would not finally resolve the question of whether PSD applies to the start-up of the RLA plant, and that a subsequent round of judicial review would be necessary. Such a scenario would waste the resources of the court, EPA, and Cyprus, and would be contrary to Cyprus' stated interest in a quick resolution of environmental requirements for the project.

Accordingly, I believe it is appropriate at this time for EPA to determine whether the prospective start-up of the RLA plant by Cyprus would constitute a major modification for PSD purposes. This determination can be made on the basis of the record created in conjunction with the earlier reactivation determination by Mr. Seitz and myself. In addition, because that earlier determination was directed to Noranda in response to requests by that company, and in view of the evident controversy surrounding that determination, it is also appropriate to reconsider its application to Cyprus, as the new owner of the facility.

II. RECONSIDERATION OF WHETHER START-UP OF THE RLA PLANT IS SUBJECT TO PSD AS A MAJOR NEW SOURCE UNDER EPA'S REACTIVATION POLICY.

After reviewing the administrative record in this matter, I find no reason to disagree with EPA's longstanding shutdown/reactivation policy or its application to the set of circumstances presented by Noranda. Hence, EPA has no basis to change its earlier determination that start-up of the RLA plant would be subject to PSD requirements as a "reactivation," except insofar as the intervening transfer of the facility to Cyprus

would require a different result.

There is one key point that emerges from the transfer to Cyprus: It represents a further attenuation, both in the chain of ownership and in time, between shutdown of the RLA plant in 1977 and its prospective reactivation. A change in ownership does not, standing alone, render a stationary source subject to PSD provisions. See 40 C.F.R. § 52.21(b)(2)(iii)(g). However, the circumstances surrounding a change in ownership may be probative of whether the shutdown of the source should be deemed permanent, which is the key analysis that must be made under EPA's reactivation policy.

In this case, the inference that the shutdown was permanent is even stronger after the transfer to Cyprus than it was when Noranda was in control. This is so because by the time Cyprus gained control, the RLA plant had already been shut down for ten years, as opposed to two years when Noranda entered the scene. In addition, by the time Cyprus took over, the RLA plant was no longer in the state's emission inventory and did not possess operating permits. Thus, from the inception of Cyprus' ownership, every indication is that Arizona considered the facility to be permanently closed.

The transfer to Cyprus serves to strengthen the reactivation determination EPA made as to Noranda. Accordingly, my determination is that the start-up of the RLA plant by Cyprus would constitute a reactivation subject to PSD requirements as a new source.

III. WHETHER START-UP OF THE RLA PLANT IS SUBJECT TO PSD REQUIREMENTS AS A MAJOR MODIFICATION.

Even if the RLA plant were not subject to PSD as a new source under the reactivation policy, it would be subject anyway if the start-up were deemed to be a "major modification" within the meaning of the Act and 40 C.F.R. § 52.21.

The central thrust of the Clean Air Act's PSD major modification provisions is that significant actual emissions increases -- i.e., those which have substantial consequences for ambient pollution concentrations and, hence, the states' need to account for such pollution -- should be brought under PSD review. See Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1979). EPA followed the lead of the court in formulating the major modification provisions of the PSD regulations by focusing the regulatory definitions on actual emissions rather than a source vs potential to emit. See 45 Fed. Reg. 52700, col. 2-3. EPA also promulgated a narrow and limited set of exclusions in its major modification regulations, but only to allow for routine changes in the normal course of business, where PSD

review would be unduly disruptive. See 40 C.F.R. §52.21(b)(2)(iii)(a) and (f).

Determining whether a major modification will occur at a particular source requires a sequential analysis of several factors. These factors are discussed in the preamble to the PSD regulations at 45 Fed. Reg. 52676, 52698 (August 7, 1980). The factors may be grouped under two basic questions: Would the start-up entail a "physical change in or change in the method of operation of a major stationary source"? If so, would the change "result in a significant net emissions increase of any pollutant subject to regulation under the Act"? See 40 C.F.R. § 52.21(b)(2)(i).

A. Physical Change or-Change in the Method of Operation of the RLA Plant.

This requirement of a major modification is satisfied if either a physical or operational change would occur. In this case, the start-up would constitute both a physical and an operational change.

1. Physical-Change.

The rehabilitation work necessary to make the Cyprus RLA plant operational would constitute a "physical change" at a major stationary source. */

EPA is aware of three reports addressing the rehabilitation work necessary to restart the RLA plant. By letter dated March 20, 1987, Noranda submitted the most recent evaluation of the minimum rehabilitation work necessary to start up the plant. The evaluation was prepared in March 1987 by E & C International ("E & CI") for the Cyprus Minerals Company and was based upon a three day inspection of the plant and review of equipment, support installation and existing piping, instruments and electrical switchgear. Noranda also submitted a June 1986 report prepared by the Ralph M. Parsons Company, also for Cyprus, which estimated "nominal cost" of \$1,836,000 for refurbishing the RLA plant, plus "worst case add-on" costs of \$906,000. However, the Parsons report was an "order of magnitude"

*/ As noted in Noranda's original Request for opinion dated September 12, 1986, sulfur emissions from the plant are 4.3 tons per day, equivalent to approximately 1500 tons per year, and thus greatly exceeding both the 100 ton per year threshold limit applicable to the primary copper smelter category or the 250 ton per year threshold for an "unlisted" major stationary source under 40 C.F.R. 52.21(a)(1).

scoping report, and based these cost estimates upon the Company's experience rehabilitating similar processing facilities rather than upon a detailed plant inspection. In addition, Noranda's original September 12, 1986 Request for opinion contained a February 1982 survey of rehabilitation work estimating a total cost of \$347,000 and monthly maintenance reports for April-July 1982 indicating that some rehabilitation work occurred in this period. From among these three estimates of necessary rehabilitation work, the E & CI evaluation can most reasonably be relied upon. It is the most current and comprehensive and was based upon an actual plant inspection by outside consultants.

The E & CI report called for the following rehabilitation:

- 1) replacing of the thickener tanks in the roaster plant's Counter Current Decantation (CCD) circuit and repairing the "significantly" damaged foundation for the CCD thickener foundation;
- 2) installing new external insulation for both fluid bed roasters and gas cyclones;
- 3) "minor" refractory repairs in one roaster;
- 4) "minor" structural repairs and painting throughout the roaster plant's steel structure to address "significant" corrosion damage;
- 5) replacing a "moderate" amount of piping and valves in the roaster plant;
- 6) restoring or replacing of stainless steel pumps at the acid plant;
- 7) installing a pressure sand filter;
- 8) rebuilding the underflow pumps in the CCD circuit.

The E & CI report concluded that the work necessary to prepare the facility for operation could be done in three to four months at a cost of \$905,000, without any contingency calculated. Contingency costs could significantly exceed this amount.*/ Even without factoring in contingent costs, \$905,000 represents roughly 10% of the replacement cost of a new roaster. See Attachment 2 of March 27, 1987 letter from Roger Ferland.

*/ The E & CI report recommended adding on a 15% contingency for craft labor and materials and the Parsons report estimated \$900,000 for "worst case" add-on costs. Information obtained during an EPA site visit confirmed that rehabilitation would require four months of double shifts.

Under the PSD definition of "major modification", a physical change does not include "routine maintenance, repair and replacement." 40 C.F.R. § 52.21(a)(2)(iii)(a). Although the E & CI report notes the good condition of the acid plant and characterizes some of the needed work as "minor" or "moderate," viewed as a whole, the minimum necessary rehabilitation effort is extensive, involving replacement of key pieces of equipment (e.g., the CCD thickener tanks, pumps, external insulation), and substantial time and cost. In an operating plant some of the individual items of the planned rehabilitation, e.g. painting, if performed regularly as part of standard maintenance procedure while the plant was functioning or in full working order, could be considered routine. Here, however, this and other numerous items of repair, as well as replacement and installation of new equipment, are needed in order for the RLA plant to begin operation. The fact that the plant requires four months of extensive rehabilitation work despite the adequate maintenance Noranda claims to have undertaken during the shutdown underscores the non-routine nature of the physical change that will occur at the plant. Thus, given the extent and nature of the repair, rebuilding and replacement of important equipment necessary to make the RLA plant operational, the rehabilitation work simply cannot be considered the "routine maintenance, repair and replacement" which is excluded from PSD review.

2. Change in the Method of operation.

The prospective start-up of the RLA plant after a ten-year shutdown would also constitute a change in the method of operation within the meaning of the PSD regulations.

As discussed above, the PSD major modification rules focus on changes in actual emissions. In general, changes at existing facilities that significantly increase actual emissions must undergo PSD review. Yet, in adopting the PSD rules EPA also recognized that Congress did not intend to require preconstruction permits for a routine change in the hours or rate of operation. EPA believed that "such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions." 45 Fed. Reg. 52704, col. 2. Accordingly, the PSD regulations exclude from the definition of physical or operational change "an increase in the hours of operation or in the production rate." 40 C.F.R. § 52.21 (b)(2)(iii)(f). However, I believe it is clear that in adopting this exclusion, EPA did not intend to remove PSD coverage in circumstances such as those presented by Cyprus. Rather, EPA limited this exclusion to situations where it would not interfere with a state's efforts in air quality planning when, in the preamble to the PSD regulations, it noted:

At the same time, any change in hours or rate of operation that would disturb a

prior assessment of a source's environmental impact should have to undergo scrutiny.

45 Fed. Reg. 52704, col. 2-3. Thus, EPA disallowed the exclusion where the increase would not be allowed under a preconstruction permit. 40 C.F.R. § 52.21(b)(2)(iii)(f).

In this case, the RLA plant was not required to obtain a preconstruction permit when it was originally erected, because it predated the PSD program. Thus, the present situation is not squarely addressed by the relevant regulatory provision. Nevertheless, EPA's original intention to disallow the exclusion where it would "disturb a prior assessment of a source's environmental impact" leads me to conclude that the exclusion should not be applied here. This is so because our present assessment as well as that of the State of Arizona, is that the RLA plant in its current non-operating condition has no environmental impact. This is evidenced in part by the removal of the plant from the state's emission inventory and the surrender of operating permits. An additional factor is the simple physical fact that the RLA plant has had zero emissions for ten years. I believe that this result is a reasonable interpretation of the PSD regulations, and in keeping with the statutory purposes. (See in particular Clean Air Act section 160(3) and (S)).

3. Combination.

In any event, it seems undeniable, when one looks at both the physical and operational changes the company is proposing to make, that the reactivation constitutes a fundamental alteration in the character of the plant, one that is neither everyday nor routine. Nor is the reactivation deserving of special treatment because of a high frequency of changes at the facility or insusceptibility to event-by-event permitting.

B. Net Emissions Increase.

Whether a significant "net emissions increase" would occur is itself a multistep analysis. The first step is to determine whether the particular physical or operational change in question would itself result in a significant increase in "actual emissions." See §52.21(b)(3)(i)(a) and (b)(21). If so, the second step is to identify and quantify any other prior increases and decreases in "actual emissions that would be 'contemporaneous' with the particular change and otherwise creditable. See § 52.21(b)(3)(i)(b). The third step is to total the increase from the particular change with the other contemporaneous increases and decreases. See § 52.21(b)(3)(i)(b). If the total would exceed zero, then a "net emissions increase" would result from the change. Each of these factors is analyzed below in the context of the prospective start-up of Cyprus" RLA plant.

1. Increase in Actual Emissions.

The start-up of the RLA plant would result in an increase in actual emissions within the meaning of the PSD regulations.

This calculation is made by comparing actual emissions as of a "particular date" -- i.e., immediately prior to the physical or operational change in question -- with the emissions from the source after the change is made. The regulations provide that actual emissions shall be the rate at which the source actually emitted the pollutant during the two-year period immediately preceding the particular date (the date of the change), unless EPA determines that a different two-year period is more representative of normal source operation. 40 C.F.R. § 52.21 (b) (21); see also 45 Fed. Reg. 52718, col. 2.

In this case, the pollutant in question is sulfur dioxide (SO₂), and emissions during the two-year period preceding start-up of the RLA plant are zero. I believe that this period is representative of normal source operations, since emissions have been zero during each of the last ten years while the plant has been shut down. Conversely, given this operational history, I do not believe that emissions during the one year in which the RLA plant was functioning is more representative of normal operations at the Casa Grande facility. After start-up, emissions will be approximately 1500 tons per year. Thus, the entire amount of emissions after start-up will be considered an increase in actual emissions, and it is obviously significant. 40 C.F.R. § 52.21 (b) (23) (i).

2. Contemporaneous Increases and Decreases in Actual Emissions.

No other Increases or decreases in actual emissions that would be contemporaneous with the start-up of the RLA plant have been brought to EPA's attention.

The regulations define the contemporaneous period as extending back five years from the physical or operational change, 40 C.F.R. § 52.21 (b) (3) (ii), and no changes in emissions at the RLA plant have been made during this period because it has been shut down during this entire period. It should be pointed out in this regard that EPA chose the "fairly large" five-year contemporaneity period over a shorter period in response to industry commenters on the PSD regulations, who had urged that no time limit be placed on crediting of prior emissions decreases. The Agency believed five years to be adequate to accommodate a normal period for corporate planning. See 45 Fed. Reg. 52701, col. 1. Thus, EPA specifically considered and rejected an arrangement whereby an emissions decrease, such as that represented by the ten-year shutdown of the RLA plant, potentially could be credited upon start-up for purposes of determining whether a major modification would occur.

3. Net Emissions Increase.

Because the actual emissions increase from start-up of the RLA plant would be approximately 1500 tons per year, and there are no contemporaneous emissions increases or decreases, the net emissions increase from start-up would also be approximately 1500 tons per year. This amount is well above the 40 tons per year "significance" level for SO₂. 40 C.F.R. § 52.21(b)(23)(i). Hence, the start-up would constitute a major modification within the meaning of the Clean Air Act and 40 C.F.R. § 52.21, and Cyprus must obtain a PSD permit prior to construction for this reason alone.

IV. SUMMARY.

Whether the prospective start-up of the RLA plant is viewed under EPA's reactivation policy or under its major modification regulations, I conclude that PSD requirements apply. This consistency of results is not surprising, because both the policy and the regulations address the same general principle that significant increases in actual emissions of air pollution, not already accounted for in air quality planning or involving significant capital investment, be reviewed under the PSD provisions of the Clean Air Act. I hope that in light of this supplemental determination, Cyprus will better understand EPA's insistence that the RLA plant undergo the normal PSD review procedures. I am also aware of Cyprus' desire to rehabilitate the RLA plant and recommence operations as soon as possible. EPA will do its best to accommodate this desire, consistent with its need to avoid undue disruption of its other PSD regulatory responsibilities.

Sincerely,

David P. Howekamp
Director
Air Management Division

cc: Lee Lockie
John Seitz

Exhibit 1

Attachment 14

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

NOV 19, 1991

MEMORANDUM

SUBJECT: Applicability of PSD to Watertown Power Plant, South Dakota;
Shutdown for 9 years.

FROM: John B. Rasnic, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Douglas M. Skie, Chief
Air Programs Branch (8AT-AP)

This is in response to your memorandum dated September 26, 1991, regarding the applicability of PSD to a shutdown power plant upon reactivation. My staff has reviewed the materials provided and we believe that the position Region VIII has taken thus far is consistent with the EPA national policy.

The general policy on whether a shutdown plant if reopened would be subject to PSD as a new source is set forth in a series of memoranda from the Stationary Source Compliance Division (SSCD) starting with a September 6, 1978 memorandum from Edward E. Reich to Stephen A. Dvorkin. According to SSCD guidance, whether a source which has been shut down is subject to PSD review upon reactivation depends on whether the shutdown is considered permanent. EPA evaluates permanence of shutdowns based upon the intent of the owner or operator. The facts and circumstances of the particular case, including duration of the shutdown and the handling of the shutdown by the State, are considered evidence of intent of the owner or operator. A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent, and of overcoming any presumption that it was. Also see the attached May 27, 1987 memorandum from John S. Seitz to David P. Howekamp regarding Reactivation of Noranda Lakeshore Mines' RLA Plant and PSD review.

In the case of the Watertown Power Plant (WPP), your staff has provided the following information. The plant consists solely of a single unit, simple cycle, oil fired combustion turbine. The WPP operated from 1979 until 1981 when the turbine failed. Extensive and costly repairs were made and completed in 1982.

Of the \$1.5 million spent on repairing the turbine, \$1.2 million was covered by insurance, and more of the cost was recovered by litigation against the manufacturer. The net cost to restore the turbine at WPP was \$237,953.

Due to operating costs and diminished load growth, however, the Board of Directors decided to place the plant on deactivated status until 1984 and decided again in 1984 and then in 1989 to continue the deactivated status. The SIP operating permit was allowed to expire.

Since 1982, the unit has been treated as being in cold standby, requiring 6-8 weeks to reactivate. Information submitted to EPA thus far indicates that the plant has been maintained to ensure its readiness. The September 13, 1991 letter to Mr. John Dale of your staff from the Missouri Basin Municipal Power Agency (MBMPA) details what has been done during the entire standby period to ensure readiness; thereby, validating the intent to reactivate. These actions include maintaining two full time employees on site, and periodic testing and maintenance of the system to ensure quick reactivation. It appears that reactivation of the plant would not require more than a limited amount of time and capital. Further, the MBMPA has stated in a variety of reports, starting from the early 1980s, their intent to reactivate the plant.

With the facts presented, which include an intent to maintain the turbine, WPP has overcome the presumption that the shutdown was permanent. Therefore, although this plant has been shut down for a period of time long enough to be considered permanently shut down, and has relinquished its operating permits, the source has demonstrated their intent to treat the shutdown as temporary. This is a unique situation given the very long period of the shutdown. However, the continued maintenance of the facility throughout the years, the resulting ability to bring the plant back on line with only a few weeks of work, and the statements of intent of the owners at the time of shutdown and in subsequent years to reactivate the facility, all compel us to concur with your determination that Missouri Basin has demonstrated that the shutdown was never intended to be permanent. Therefore, given the evidence presented, reactivation of this combustion turbine would not be subject to PSD requirements.

If you have any questions concerning our response, please contact Clara Poffenberger at FTS 398-8709.

Attachments

cc: John Dale, Region VIII
Gary McCutchen, NSR Section, AQMD (MD-15)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
SEP 6 1978

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: PSD Requirements

FROM: Director
Division of Stationary Source Enforcement

TO: Stephen A. Dvorkin, Chief
General Enforcement Branch
Region II

In response to your memo dated June 29, 1978, we have consulted with the Offices of General Counsel and Air Quality Planning and Standards and provide the following responses to your questions regarding the applicability of several PSD requirements.

Q - 1(a). Is a source which shut down approximately four years ago because of an industrial accident, and which was not and is not required to obtain a permit under a SIP, subject to the requirements of PSD? This source was not subject to PSD requirements prior to March 1, 1978.

A - This is a question which we have not previously addressed, but we believe that EPA policy should be as follows. A source which had been shut down would be a new source for PSD purposes upon reopening if the shutdown was permanent. Conversely, it would not be a new source if the shutdown was not permanent. Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not

permanent, and of overcoming any presumption that it was. Under the facts you have given us, we would presume that the shutdown was permanent, since it has already lasted about four years. Consequently, unless the owner or operator of the source were to rebut that presumption, we would treat the source as a new source for PSD purposes.

We assume that your statement that the source was not subject to the PSD regulations in effect before March 1, 1978, means that it was not in one of the nineteen source categories listed in Section 52.21(d) (1) of those regulations. A proposed new source which was not in one of those categories would be subject to the PSD regulations promulgated on June 19, 1978, unless (1) all required SIP permits had been obtained by March 1, 1978, and (2) construction commences before March 19, 1979, is not discontinued for 18 months or more and is completed within a reasonable time. See Section 52.21(i) (3), 43 FR 26406. Here, all required SIP permits were obtained by March 1, since none was required. Consequently, the source would not be subject to the new regulations, assuming that the reopening is commenced before March 19, 1979, is not discontinued for more than 18 months and is completed within a reasonable time.

If we were to treat the source as an existing source for PSD purposes, we would also conclude that it is not subject to the new regulations. [SEE FOOTNOTE 1] No source on which construction commenced before June 1, 1975, would be subject to those regulations. [SEE FOOTNOTE 1] See Clean Air Act Sections 168(b), 169(4); 40 CFR 52.21(d) (1) (1977). Here, since the source was in operation about 4 years ago, construction on it presumably commenced before then, well before June 1, 1975. Hence, it would (presumably) not be subject to the new regulations.

Q - 1(b). Would your answer to 1.a., above, change if the source is or was required to obtain a SIP permit?

A - If the source shut down temporarily, it would not be required to obtain a PSD permit in order to start up.

[FOOTNOTE 1] Application of this rule requires special guidance for multifacility sources which construct in phases. Generally, if one phase of a multifacility source commenced construction by June 1, 1975, all other mutually dependent phases specifically approved for construction at the same time will also be "grandfathered". On the other hand, each independent facility must have commenced construction individually by June 1, 1975, to have achieved grandfather status. See 43 FR 26396, 19 June 1978.

On the other hand, if the source shut down permanently, it would, upon reopening, be required to obtain a PSD permit unless the following two conditions were met: 1) the SIP permit was obtained prior to 3/1/78 and 2) any construction necessary for reopening is commenced prior to 3/19/79, is not discontinued for 18 months or more and is completed within a reasonable time.

Q - 2. Is the EPA required in all cases to forebear from issuing a PSD permit until a SIP permit has been issued or is such forbearance required only when the source is subject to the "Interpretative Ruling" (41 FR 55524, December 21, 1976)?

A - EPA should refrain from issuing a PSD permit prior to issuance of a SIP permit only in cases where the source is also subject to the Interpretative Ruling. (See 43 FR 26402, column 3.)

Q - 3. In the evaluation of BACT, does equipment reliability play a part, i.e., should a unit capable of 80% control with a 20% downtime, be preferred to a unit capable of 90% control with a 35% downtime? Can backup equipment be required for BACT purposes?

A - Questions concerning BACT should be addressed to the Control Programs Development Division in Durham, N.C.

Q - 4. For the purpose of determining what constitutes "air pollution control equipment," what is meant by the phrase "... normal product of the source or its normal operation"? (43 FR 26392, mid. col., June 19, 1978). Does that refer to the quantity or quality of the product or both, i.e., if a baghouse collects 100% of the product, a settling chamber collects 20%, and without some device no product is collected, what is deemed to be "air pollution control equipment"?

A - If a source (such as one which produces zinc-oxide) cannot capture any of its product without the use of some type of control device, the least efficient control device used in the industry will be considered vital to the process. For example, if sources in such an industry typically employ either settling chambers or baghouses, potential emissions will be calculated as the emissions from such a source with a settling chamber installed.

Q - 5. Do the provisions of Section 167 of the Clean Air Act, which refer to issuance of an Order and seeking injunctive relief for PSD violations, create enforcement authorities independent of those created in Section 113 for SIP violations, or do they simply incorporate Section 113 by reference?

A - We believe that Section 167 provides the Agency with enforcement authority which

guidance on implementation of Section 167. This guidance should be completed shortly. In the interim, the Agency should enforce against violations of the PSD requirements under the mechanisms established by Section 113, generally. There is one important situation, however, in which resort to Section 167 may be necessary. This would occur when a state had issued a permit that EPA considered to be invalid. In this situation, we believe that Section 167 provides the Agency with the authority to halt the construction of the source directly, without first having to resort to the cumbersome process of seeking a judicial declaration that the state permit is invalid. (See 42 FR 57473 (1977)). In this respect, Section 167 provides the agency with authority similar to that provided by section 113(a) (5) and (b)(5) to prevent sources with invalid permits from constructing in nonattainment areas. Please note, however, that no delegations for enforcement of the PSD requirements have been signed yet, and so any action under Section 167 would have to be taken in close coordination with DSSE, and any Section 167 orders would have to be signed by the Administrator.

If you have any further questions on these issues, please contact Libby Scopino at FTS 755-2564.

Edward E. Reich

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

MAY 27 1987

MEMORANDUM

SUBJECT: Reactivation of Noranda Lakeshore Mines, RLA Plant and PSD Review

FROM: John S. Seitz, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: David P. Howekamp, Director
Air Management Division, Region IX

Pursuant to your recent request, this memorandum addresses the status of Noranda Lakeshore Mines' roaster leach acid (RLA) plant in Arizona. Noranda is contemplating startup of the RLA plant which has been shut down since 1977. The company contends that the shutdown was not intended to be permanent, and therefore believes that the plant should not be subject to PSD review.

Whether or not a source which has been shut down is subject to PSD review upon reactivation depends on whether the shutdown is considered permanent. EPA evaluates permanence of shutdowns based on the intent of the owner or operator. The facts and circumstances of the particular case, including the duration of the shutdown and the handling of the shutdown by the State, are considered as evidence of the owner or operator's intent. This decision making framework follows the policy on plant reactivation which EPA set forth in 1978. The September 6, 1978 memorandum which initiated this policy states: "A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent. The owner or operator proposing to reopen the source would have the burden of showing that the shutdown was not permanent,

and of overcoming any presumption that it was." Several memoranda later issued by SSCD (August 8, 1980; October 3, 1980; July 9, 1982) applied this shutdown/reactivation policy.

In the case of Noranda's RLA plant, your staff has provided the following information. The RLA plant, previously owned by Hecla Mining Company, was shut down by Hecla in 1977 due to market conditions. Reports issued by Hecla at the end of 1977 stated that the ALA facility could be operational within one week. However, due to poor economic conditions Hecla decided to terminate their lease for the ALA plant. In 1979 Noranda purchased the facility, but never operated the ALA plant due to similar economic problems; the ALA plant itself has not operated since 1977. The ALA plant was deleted from Noranda's operating permits in 1980, and Noranda's remaining operating permits were surrendered in 1984. In 1986, the ALA plant was removed from the State's emission inventory. Your staff has also indicated that the roaster may need at least several hundred thousand dollars worth of work before being operable, and could not come on line for approximately four months.

Since the ALA plant has been shut down for well over 2 years and has been removed from the State's emission inventory, EPA presumes that the shutdown was permanent. However, Noranda has submitted documentation to Region 9 seeking to demonstrate that the shutdown was not intended to be permanent. Included is a 1980 statement of intent for long term operation of the facility, evidence of some search for toll concentrates of sufficient quality to allow operation, and evidence of some level of custodial maintenance. The question which now arises is whether the information submitted is sufficient to rebut the presumption of a permanent shutdown.

EPA evaluates the permanence of the shutdown based on the demonstrated intent of the owner or operator to reopen the source. Facts and circumstances surrounding the shutdown, including duration of the shutdown and the handling of the shutdown by the source and State, are evidence of the owner's intent. In Noranda's case, the significant amount of time that has elapsed, as well as Noranda's failure to maintain the operating permit, removal of the ALA plant from the emissions inventory, and the time and capital that must be invested in the rehabilitation of the plant in order to make it operable, are evidence that the shutdown was intended to be permanent.

There is not sufficient evidence of intent to reopen the source to regard this as a

temporary shutdown. Therefore, SSCD concurs with Region 9's determination that the source, for PSD purposes, is permanently shut down, and must meet Federal PSD requirements for construction and operation.

If You have any questions, please contact Sally M. Farrell at FTS 382- 2875.

cc: Wayne Blackard, Region IX
Nancy Harney, Region IX
Bruce Armstrong, OPAR
NSR Contacts

Exhibit 1

Attachment 15



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

September 7, 2001

Reply To
Attn Of: OAQ-107

Jerald W. Holmes, General Manager
Forest Products Division
Colville Tribal Enterprise Corporation
P.O. Box 3293
Omak, Washington 98841

Re: Startup of Quality Veneer & Lumber Facility - Air Pollution Control Regulatory
Applicability

Dear Mr. Holmes:

This letter responds to your letters of June 15 and July 23, 2001, in which you requested EPA's views on a number of regulatory matters under the Clean Air Act (CAA) related to the Colville Tribal Enterprise Corporation's (CTEC) proposed purchase and operation of the Quality Veneer & Lumber plywood facility (QVL facility) located in Omak, Washington. As you have indicated, CTEC is in the process of purchasing the QVL facility, which has been shutdown since July 2000. It is our understanding that the QVL facility was, at the time of shutdown, a major source of air pollutants for purposes of both the Prevention of Significant Deterioration (PSD) construction permits program under Title I of the CAA and the Part 71 operating permits program (Part 71) under Title V of the CAA. We base the following responses to your questions on the information provided by CTEC and its consultant to EPA in your letters of June 15 and July 23, 2001, and in your telephone call with Dan Meyer of my staff on August 6, 2001.

1. Would CTEC's Startup of the QVL facility be Considered Construction of a New Source or the Continued Operation of an Existing Source?

Based on the information provided by CTEC and its consultant, EPA would not consider the startup of the QVL facility by CTEC to be a new source for purposes of the PSD program, but instead would consider it the restart of an existing PSD facility. According to EPA

guidance,¹

A source which had been shut down would be a new source for PSD purposes if the shutdown was permanent. Conversely, it would not be a new source if the shutdown was not permanent. Whether a shutdown was permanent depends upon the intention of the owner or operator at the time of the shutdown as determined from all the facts and circumstances, including the cause of the shutdown and the handling of the shutdown by the State. A shutdown lasting for two years or more, or resulting in removal of the source from the emissions inventory of the State, should be presumed permanent.

The information provided by CTEC does not indicate that the shutdown of the QVL facility was intended to be permanent. Even before the QVL facility ceased operation, CTEC entered into negotiations to acquire the QVL facility with the clear intent of operating the facility.² Negotiations continued after the shutdown of the facility in July 2000 until a tentative agreement was reached in September 2000 for CTEC's purchase of the facility. QVL filed for bankruptcy under Chapter 11 in October 2000 in an effort to reorganize its business, and negotiations for CTEC's purchase of the facility continued during this time. It is our understanding that CTEC and the Bankruptcy Trustee are currently finalizing agreements for CTEC's purchase of the QVL facility. Based on these facts and the fact that facility has been shutdown less than two years, we agree with CTEC's contention that the QVL facility was never intended to be shutdown permanently. Therefore, EPA concludes that the QVL facility should not be considered a new source for purposes of PSD upon startup. Assuming CTEC resumes operation of the QVL facility by July 2002, the QVL facility will have been shut down for less than two years.³ Therefore, based on EPA guidance, EPA does not presume the shutdown was permanent.

2. Are there Any Modifications Planned that Would be Subject to PSD Permitting?

Because the QVL facility is an existing major source, it would be subject to PSD permitting upon startup of the facility if a major modification occurs. A major modification is defined as:

[a]ny physical change in or change in the method of operation of a major stationary source that would result in a significant net emission increase of any pollutant subject to regulation under the Act.

40 C.F.R. 52.21(b)(2)(i).

¹Memo from Edward E. Reich, Director, Div. Of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief, General Enforcement Branch, Region II (Sept. 6, 1978).

²Confidentiality Agreement between QVL and the Colville Confederated Tribes (June 20, 2000); Colville Confederated Tribes Purchase Offer to QVL for Facility (Sept. 7, 2000); and QVL Counter Offer (Sept. 8, 2000).

³EPA does not maintain a formal inventory of air emissions from sources on the Colville Indian Reservation.

You state in your July 23, 2001, letter to EPA:

The Colville Tribal Enterprise Corporation does not plan any modifications to the facility, which would increase emissions. The corporation plans to conduct regular maintenance activities on the two boilers and turbines. This maintenance would be considered normal annual maintenance. The capacity of the boilers and turbines is not being increased.

EPA understands you to mean that the CTEC will be conducting only routine maintenance, repair, and replacement. Such physical changes are exempt from PSD review as provided in 40 C.F.R. 52.21(b)(2)(iii)(a). In the event that CTEC is unsure regarding whether a specific action it intends to undertake constitutes "routine" maintenance, repair, or replacement, please consult EPA for a regulatory determination prior to commencing the action.

In addition to refraining from "non-routine" physical changes, you have also stated that CTEC does not intend to change facility operations when it restarts the QVL facility.⁴ In that event, there would also be no change in the method of operation of the facility. If CTEC acts consistent with your intentions and operates the facility as you have described, the restart of the facility would not trigger the major modification provisions of the PSD program. We caution, however, that we have based this conclusion on CTEC's statements that it does not intend to make any physical changes to the facility, aside from routine maintenance, or any changes in the method of operating the facility.

3. Would Startup of the QVL Facility's Boilers Subject the Facility to the Acid Rain Program?

As you indicated to Dan Meyer of my staff on August 6, 2001, the two hog-fuel boilers began supplying steam to two 12.5 megawatt steam turbines for electric generation and sale to local public utilities (such as the Okanogan PUD) in approximately 1980. Neither boiler combusts fossil fuel, and thus neither boiler is required to obtain an Acid Rain permit under Title IV of the CAA because the permitting requirements apply only to fossil fuel-fired combustion devices (definition of "unit" at 40 C.F.R. 72.2). Even if the previous operators of the facility used fossil fuel to supplement combustion in the boilers, another exemption applies. A fossil fuel-fired combustion unit that began generating electricity for sale before November 15, 1990, is exempt from permitting requirements of the Acid Rain program if the unit served a generator(s) with combined nameplate capacity equal to or less than 25 MW. *See* 40 C.F.R. 72.6(b)(2). Even if we assume that each boiler served both generators, the combined nameplate capacity of the generators is not greater than 25 MW. Thus, neither boiler is required to obtain an Acid Rain permit.

4. Must CTEC Submit a New Part 71 Application?

As a major source located in Indian Country, the QVL facility is subject to the requirements of the Part 71 operating permits program. QVL submitted an application for a Part 71 permit to EPA on August 18, 1999, which included an annual report of its actual emissions for 1998, a fee calculation work sheet, and payment of the first annual fee. By letter dated November 17, 1999, EPA notified QVL that its Part 71 permit application was deemed complete.

⁴August 6, 2001, phone conversation between Dan Meyer, EPA, and Jerald W. Holmes, CTEC.

EPA's November 17, 1999 letter also requested QVL to submit the following information to supplement its Part 71 application: a schedule of compliance as required by 40 C.F.R. 71.5(c)(8)(ii)(C); a determination of the applicability of Clean Air Act section 112(r) to the QVL facility; a determination of the applicability of the Acid Rain provisions of Title IV of the CAA to the QVL facility, and voluntary limits on the potential to emit of the QVL facility as required by the Compliance Order issued by EPA to the QVL facility on xxxxx. QVL provided information in response to EPA's request by letter dated January 10, 2000, although the information in the letter was not certified by a responsible official in accordance with 40 C.F.R. 71.5(d). In addition, QVL has not submitted the annual report, fee calculation worksheet, and annual fee for 1999, as required by 40 C.F.R. 71.9(h)(1), which was due on November 15, 2000. The next annual report, fee calculation worksheet, and annual fee for the QVL facility for the year 2000 is due on November 15, 2001.

In light of the pending change of ownership of the QVL facility, EPA believes the best course of action would be for CTEC to:

- a. thoroughly review the Part 71 application submitted by QVL on August, 18, 1999, the supplemental information provided by QVL by letter dated January 10, 2000, the information provided by the Tribe's consultant regarding concerns with QVL's application, the Compliance Order issued by EPA to QVL on April 15, 1999, and the current status of the QVL facility;
- b. submit a revised and updated Part 71 application for the QVL facility certified by a responsible official for CTEC in accordance with 40 C.F.R. 71.5(d); and
- c. submit the annual report, fee calculation worksheet, and annual fee for 1999, as required by 40 C.F.R. 71.9(h)(1), and interest and penalties for the past due fees, as required by 40 C.F.R. 71.9(l).

EPA believes that filing a revised and updated Part 71 application would best ensure that CTEC is familiar with all aspects of the application and operation of the QVL facility and will be able to work effectively with EPA in the issuance of the Part 71 permit to CTEC for the facility. It would also ensure that all the required information is in a single document. The QVL facility would not lose the application shield by filing a revised and updated permit application.

CTEC could instead choose to rely on the existing Part 71 permit application for the QVL facility, provided that CTEC:

- a. thoroughly reviews the Part 71 application submitted by QVL on August, 18, 1999, the supplemental information provided by QVL by letter dated January 10, 2000, the information provided by the Tribe's consultant regarding concerns with QVL's application, the Compliance Order issued by EPA to QVL on April 15, 1999, and the current status of the QVL facility;
- b. submits to EPA a statement certified by a responsible official for CTEC in accordance with 40 C.F.R. 71.5(d), stating that CTEC has reviewed all of the documentation and information referred to in the subparagraph (a) above and that, based on information and believe formed after reasonable inquiry, the statements and information in the application submitted by QVL on August, 18, 1999 and in the supplemental letter submitted by QVL on January 10, 2000, are true, accurate and complete; and
- c. the annual report, fee calculation worksheet, and annual fee for 1999, as required by 40 C.F.R. 71.9(h)(1), and interest and penalties for the past due fees, as required by 40

EPA does not believe this option results in a significant reduction in the work required of CTEC in order to fulfill its obligations under Part 71 upon its purchase of the QVL facility. Based on past experience, however, EPA does believe that this option could increase the risk that CTEC might overlook an error in the information provided by QVL or a change in circumstance of the facility since the application was first submitted, which error or omission would then be the responsibility of CTEC because it has certified the information as true, accurate, and complete. We therefore recommend and prefer that CTEC submit a revised and updated Part 71 application. In either case, EPA may determine during the processing of the permit application that additional information is necessary to evaluate or take final action on the Part 71 permit and CTEC would be required to provide such additional information as provided in 40 C.F.R. 71.5(a)(2).

5. Are There Any Outstanding Air Enforcement Issues?

As discussed in your letter of June 15, 2001, EPA issued a Compliance Order on April 15, 1999 to the QVL facility relating to the veneer dryers. EPA is not aware of any other potential Clean Air Act compliance issues at the QVL facility except for the failure to pay the Part 71 operating permit fees for 1999 and the failure to certify the supplemental information provided by QVL in its letter dated January 10, 2000. EPA emphasizes, however, that the ultimate responsibility for determining the compliance status of the QVL facility under the Clean Air Act rests with the owner and operator of the facility.

I am enclosing a copy of EPA's final policy entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" published in the Federal Register on April 11, 2000 (65 FR 19618) (Self-Disclosure Policy), for your consideration in the event you discover any Clean Air Act violations during the purchase and subsequent operation of the QVL facility. EPA issued the Self-Disclosure Policy to encourage facilities regulated by EPA to conduct voluntary compliance evaluations and to disclose and promptly correct violations. As an incentive for companies to undertake self-policing, self-disclosure and self-correction of violations, EPA may substantially reduce or eliminate gravity-based civil penalties, although EPA retains its discretion to recover any economic benefit gained as a result of noncompliance.

I hope this letter responds to your questions. If you have a question regarding this response, please contact me at 206-553-6641.

Sincerely,

Douglas E. Hardesty, Manager
Federal and Delegated Air Programs

cc: Rachel Moses, Environmental Trust Department, Confederated Tribes of the Colville Reservation
Richard DuBey, Special Counsel to the Environmental Trust Department

Exhibit 1
Attachment 16

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
324 EAST ELEVENTH STREET
KANSAS CITY, MISSOURI - 64106

October 9, 1979

Mr. Harvey D. Shell
Shell Engineering and Associates
P.O. Box 1091
Columbia, Missouri 65205

Dear Mr. Shell:

As discussed by Mr. Charles W. Whitmore of my staff on October 5, 1979, a source which has permanently ceased operation would be subject to prevention of significant air quality deterioration (PSD) review before it could be reactivated. As stated in my letter of September 25, 1979, the Environmental Protection Agency (EPA) presumes that any source shut down for two years or more has permanently ceased operation. However, the EPA also gives the source owner or operator the right to rebut this presumption by demonstrating the shutdown was never intended to be and, in fact, was not a permanent shutdown.

I have included three documents which establish the basis for the two-year presumption of permanency. They are the PSD regulations of June 19, 1978, the proposed revisions to the PSD regulations, dated September 5, 1979, and a determination by the Division of Stationary Source Enforcement, designated as PSD 67.

Section 52.21(k) of the PSD regulations of June 19, 1978, exempts from air quality impact analysis emissions which are of a temporary nature. The preamble of these regulations at the bottom of the first column of page 26394 discusses the definition of "temporary" and establishes that emissions occurring for less than two years in one location would generally be considered temporary.

The PSD 67 discusses a source which was shut down for four years due to an industrial accident and now proposes to reopen. The conclusion is made in this discussion that the source would be subject to a PSD review if the source had been shut down permanently. This decision also states that a shutdown lasting for two years or more, or which results in removing the source from the emissions inventory of the state is presumed to be permanent.

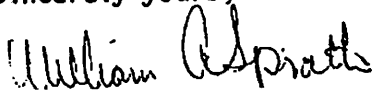
In the preamble of the proposed revisions to the PSD regulations, published September 5, 1979, page 51935 discusses the application of offsets within a major source complex to avoid an increase of emissions from the complex. The first full paragraph in the second column of the page states that emissions from the source over the last one to two year period may be considered in determining creditable offset. The preceding paragraph states that an obsolete unit which has been shut down for several years would not offer any credit for offsets.

The items discussed above establish EPA policy that temporary emissions and temporary shutdowns are considered to be of two-year duration or less. It also establishes that the credit which can be given for offset purposes must be the emissions of the last one or two year period. Thus, a source which has been shut down for more than that length of time could not be used for offset although it might physically be capable of operating. It then follows that a source which has not operated for in excess of two years and is not in the air quality baseline would be considered a new source if operation is commenced.

As stated in my letter of September 25, 1979, the owner or operator may rebut the presumption of permanent shutdown by demonstrating that the source was never intended to be a permanent shutdown. This could include such things as procedures which were taken to maintain the source in operating conditions, maintaining an emissions inventory in the state inventory file, or actively pursuing the repair or reconstruction of the source.

If you wish to discuss this further, please call Mr. Whitmore at (816)374-3791.

Sincerely yours,



William A. Spratlin, Jr., P.E.
Chief, Air Support Branch
Air and Hazardous Materials Division

Enclosures

cc: Robert J. Schreiber, Jr., P.E.
Staff Director, Air Quality Program
Jefferson City, Missouri

Ms. Libby Scopino
Division of Stationary Source Enforcement
Washington, D.C.

Exhibit 1
Attachment 17



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

APR 09 2008

Mr. Richard A. Hyde, P.E.
Director
Air Permits Division
Office of Permitting, Remediation, and Registration
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Dear Mr. Hyde:

We have identified several significant questions regarding the recent issuance of the ASARCO State New Source Review Permit Number 20345 renewal on February 13, 2008, and its future incorporation into the proposed Federal Operating Program Permit Number O-02871. Our questions are based on our review of the proposed and issued permits referenced above, associated documents, and the Executive Director's Report to the Commission. In general, the information available to U.S. Environmental Protection Agency (EPA) appears to point to ASARCO being potentially subject to Prevention of Significant Deterioration (PSD) requirements, which include provisions such as requiring compliance with best available control technologies. The Texas Commission on Environmental Quality (TCEQ) should clarify the record with respect to its conclusion that the renewal of Permit Number 20345 is not subject to Prevention of Significant Deterioration applicability requirements.

We look forward to entering into discussions with you concerning the items discussed in the Enclosure. If you have any questions or would like to discuss further, please call me or Mr. Jeff Robinson of my staff at (214) 665-6435. Thank you for your assistance in this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Thomas H. Diggs".

Thomas H. Diggs
Associate Director for Air

Enclosure

Enclosure

1. It appears that TCEQ made a determination through its Temporary Shutdown Policy that the facility was not subject to PSD requirements through its renewal of Permit Number 20345. Reactivation of a facility that has been in an extended period of in-operation may trigger PSD requirements as a new major stationary source. The EPA's Reactivation Policy states that shutdowns of more than two years are presumed to be permanent, although some exceptions may be considered.¹

The Executive Director's Report to the Commission concludes that an amendment application is not necessary for ASARCO to restart the plant at this time based upon available information, although it contains information that raises issues about PSD applicability. Observations made during the inspection of the facility draw into question whether the facility was maintained in a state of readiness to resume operations. The Report also indicated that the extended period of in-operation resulted in the need for repairs and refurbishments prior to startup and operation. For example, corrosion damage to the drying and absorption towers in Acid Plant Number 1 must be addressed prior to startup and operation. Other equipment needing attention at the facility includes baghouses, acid plants, electrostatic precipitators, and general housekeeping to repair corrosion damage on vessels, ducts, equipment and the repair and replacement of electrical wiring. Therefore, we request the State perform a PSD applicability determination for the permit authorizing restart of the ASARCO facility to ensure that all applicable requirements are included in the Federal Operating Permit (FOP) permit. If PSD is determined to be applicable, it will require the utilization of PSD modeling protocols and the implementation of best available control technology.

2. The TCEQ should determine whether restart of this idle facility triggers PSD as a major modification. An analysis of whether a physical change will occur should be documented. A detailed review of the rehabilitation work necessary to restart the ASARCO facility, including the nominal cost, and a determination as to whether the physical changes are within the "routine maintenance, repair and replacement" regulatory exception should be made, by considering the nature, extent, purpose, frequency and cost of the work as well as other relevant factors.² The TCEQ should also determine whether restart of this dormant facility will trigger PSD as a change in the method of operation as it applies to an increase in hours.³ In several similar determinations, EPA has concluded

¹ The EPA's Reactivation Policy is discussed in: Memo from Edward E. Reich (September 6, 1978), Memo from Edward Reich (August 8, 1980), Memo from John S. Seitz (May 27, 1987), Letter from David P. Howekamp, Supplemental PSD Applicability Determination Cyprus Casa Grande Corporation Copper Mining and Processing Facilities (November 6, 1987), Memo from John B. Rasnic (November 9, 1991).

² See discussion in the November 6, 1987, letter from David P. Howekamp, and Title V petition order Number 6-99-2, In the Matter of Monroe Electric Generating Plant, Entergy Louisiana, Inc. (June 11, 1999), http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions/entergy_decision1999.pdf.

³ Id.

that in calculating the net emissions increase for reactivation of long-dormant sources potentially subject to PSD, the source is considered to have zero emissions as its baseline actual emissions.⁴

3. The EPA questions why the FOP public noticed on August 15, 2006, was subject to public notice and comment prior to Permit Number 20345 litigation being resolved and issued as a final permit. Please explain whether the FOP incorporates the renewed permit or its previous version, and whether TCEQ intends to re-notice the permit for public comment.
4. Currently, El Paso is designated as attainment for the 1997 8-hour ozone standard (0.08 parts per million (ppm)). However, based on data from the years of 2005 to 2007, the area would be designated as nonattainment for the new 2008 8-hour ozone standard (0.075 ppm). The current 2005-2007 8-hour ozone design value for El Paso is 0.079 ppm. The TCEQ should evaluate whether the start up of ASARCO will further contribute to ozone formation and a greater potential for a non-attainment designation of the area.
5. ASARCO's emissions may affect visibility for Texas and New Mexico Class I areas. The ASARCO facility may not have been included in either TCEQ's assessment for Best Available Retrofit Technology (BART) eligible facilities or the emissions inventory for the 2002 and 2018 modeling. To be BART-eligible, sources must (1) have the potential to emit 250 tons or more of a visibility-impairing air pollutant, (2) have begun operation after August 7, 1962, and were in existence on August 7, 1977, and (3) fall within one or more of 26 specifically listed source categories (copper smelters are covered). If an upgrade is deemed to be a reconstruction, then the upgrade takes on the date of the reconstruction for the purpose of determining whether it falls in the 1962-1977 date. We are aware that the CONTOP furnaces may have been replaced in 1992. If an upgrade is determined to be a modification, then it does not affect a BART determination. However, TCEQ should ensure that with the final submittal of the Regional Haze State Implementation Plan, it has (1) assessed BART for this facility; and (2) included this facility in its reasonable progress analysis and long term strategy, including 2018 projections.
6. We request that TCEQ make a determination regarding whether ASARCO is subject to the applicable requirements of 40 Code of Federal Regulations Part 63 Subparts EEEEEEE and FFFFFFFF, the area source standards for primary and secondary copper smelters. ASARCO must demonstrate compliance with all the applicable requirements at start up or be subject to EPA enforcement action.

⁴ Id.

Exhibit 1
Attachment 18

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

December 13, 2000

4APT-ARB

Mr. Ronald Methier, Chief
Air Protection Branch
Georgia Environmental Protection Division
4244 International Parkway, Suite 120
Atlanta, Georgia 30354

SUBJ: Southern LNG, Inc., Elba Island Terminal, Savannah Georgia
Draft Air Quality Permit and PSD Preliminary Determination

Dear Mr. Methier:

We are in receipt of the letter from the Georgia Environmental Protection Division (GAEPD) dated November 6, 2000, transmitting a draft air quality permit and prevention of significant deterioration (PSD) preliminary determination for the above facility. This project consists of reactivating the Southern LNG Elba Island liquified natural gas (LNG) terminal. The terminal has not been in commercial operation since 1982. As part of the project, Southern LNG proposes to replace five existing natural gas-fired LNG vaporizers with five larger capacity LNG vaporizers. We have discussed the project with representatives from GAEPD and Southern LNG.

Our comments on the preliminary determination, draft permit, and permit application are as follows:

1. Southern LNG has taken the position that, except for the new vaporizers, all other emissions units at the facility should be collectively considered an existing source and not a new source for PSD applicability purposes. Support for this position has been supplied in terms of EPA's Reactivation Policy. In brief, the Reactivation Policy provides that a reactivated facility can be considered an existing source if the facility owner can rebut the presumption that the deactivation of the facility was intended to be a permanent shutdown. GAEPD apparently agrees with the applicant's position and has not required PSD review for emissions units other than the new vaporizers. At this time we are not taking exception with conclusions regarding the Reactivation Policy, although concluding that a facility commercially inactive for 18 years is not a new source definitely extends the Reactivation Policy presumptive rebuttal provision to its limits.

What the permit application and the preliminary determination did not address, however, is whether the planned reactivation constitutes a modification under PSD rules. In two recent actions, EPA concluded that reactivation of a long dormant facility constituted a change in the method of operation and was therefore a modification. The more definitive of these two actions was a June 1999 Order issued by the EPA Administrator in relation to Entergy Louisiana's Monroe Electric Generating Plant (Entergy). In the Entergy case, the Administrator determined that the PSD exemption excluding an increase in hours of operation from consideration as a modification was not applicable. The Administrator reasoned that the intent of this exemption was to allow operating facilities to respond to changes in market conditions, and not to accommodate startup of facilities that had long been dormant. The second action was an August 2000 opinion from EPA Region 1 citing the Entergy Order in concurring with a state permitting agency that the reactivation of a power generating facility should be considered a modification.

In response to our concern (stemming from the Entergy Order) about whether reactivation constitutes a modification under PSD rules, Southern LNG recently provided an assessment to demonstrate that the circumstances in the Entergy case and in the Region 1 case differ from those in the Elba Island terminal case. Although we appreciate Southern LNG's timely comments, we do not believe these comments distinguish the LNG terminal from the Entergy facility. Southern LNG comments that the Elba Island terminal was never in a "shutdown" mode as was the Entergy facility. In fact, EPA did not rule on whether the Entergy facility was ever permanently shut down. Rather, EPA's position in the Entergy case was that the Entergy facility had long been dormant and that the increase in hours of operation resulting from reactivation should be considered a change in the method of operation because reactivation of a long-dormant facility did not meet the intent of the increase-in-hours-of-operation exemption. Similarly, we are not necessarily contending that the Elba Island terminal was permanently shut down. Our view instead is that, by any objective standard, the emissions units at the terminal have long been dormant just as in the Entergy case.

In summary, we request that GAEPD reconsider whether reactivation of the Southern LNG Elba Island terminal constitutes a major modification under PSD rules. This reconsideration should take into account the findings in the Entergy Order issued June 11, 1999.

2. The existing permit for the Southern LNG terminal is dated March 1979 and does not refer to any emissions units other than the existing vaporizers. We understand from GAEPD that the internal combustion reciprocating engine generators and combustion turbine generators were not listed in the permit because Georgia rules at the time did not cover such emissions units. If the draft construction permit for the reactivation project remains unchanged, the generators (with a total potential regulated pollutant emission rate of more than 1,000 tons per year) will continue without enforceable permit restrictions. Unless the generators are addressed in the construction permit for the reactivation, we

anticipate that the generic applicable requirements for these units in the title V operating permit eventually issued for the Elba Island terminal will allow emissions far in excess of those considered in the modeling evaluation for the reactivation.

3. We have the following comments on the vaporizer best available control technology (BACT) section of the September 2000 revised permit application:
 - a. On page 6-1, the applicant states that the volatile organic compounds (VOC) emissions increase exceeds the PSD significant emissions increase level of 40 tons per year (TPY) and refers to Table 6-1 as consistent with this statement. Table 6-1 shows a VOC emissions increase of 19.3 tpy which is less than the significant increase level. (Section 6.4.3 of the BACT evaluation contains a review for VOC emissions but refers to this as a "voluntary" review for information purposes only.) The draft permit includes emission limits for nitrogen oxides (NO_x) and carbon monoxide (CO) but not for VOC. We recommend that GAEPD consider including a VOC emission limit to insure that PSD avoidance for VOC is enforceable.
 - b. Within the NO_x BACT evaluation section of the permit application, the applicant discusses good combustion control practices (page 6-9). The first paragraph of this discussion refers repeatedly to gas turbines and not to vaporizers. GAEPD should confirm that the good combustion control practice assessment is appropriate for vaporizers.
 - c. On page 6-11 of the permit application, the applicant makes the following statement: "T-Thermal plans to institute future modifications to the combustion air staging design to further reduce NO_x production in this burner, but a commercial prototype is not currently available." We recommend that GAEPD ask Southern LNG to provide periodic reports on progress in T-Thermal burner improvements and to assess the feasibility of burner retrofit when improvements are commercially available.
4. In terms of the air quality impact assessment, our review comments on this PSD application have been discussed with GAEPD. The additional information through these discussions resolved some of our comments and questions. The following are our remaining comments:
 - a. Impact Area Visibility Analysis - The Additional Impact Analysis of the permit application (Section 7.0) addressed visibility in the "near field region" (i.e., the area within 50 km of the Elba Island terminal). Of concern in this analysis are visibility sensitive receptors within the impact area (e.g., airports, state parks, etc.). The provided analysis appears to have been performed only at a distance of 50 km from the Elba Island terminal. Confirmation is needed that no visibility sensitive receptors exist closer than 50 km from the terminal.

- b. Growth, Soils, and Vegetation Analysis - The Additional Impact Analysis of the permit application (Section 7.0) provided no assessment of growth, soils, and vegetation impacts. This section only refers to a Federal Energy Regulatory Commission (FERC) favorable environmental assessment (EA) published in January 2000. Because no specific analysis is provided in the application, it is unknown whether: 1) the EA is appropriate to the current facility configuration, and 2) the EA analysis is appropriate and sufficient to satisfy PSD requirements. Not providing this information in the application means it may not have been available for public review of the draft PSD permit.
- c. ISCPRIME - The separately provided project specific justification for the use of the non-regulatory model ISCPRIME in this application has been reviewed and found appropriate and sufficient. ISCPRIME is an acceptable air quality model to estimate Southern LNG's impacts.
- d. Southern LNG PSD Sources - The Elba Island terminal has not operated since 1982. The PSD major source NO₂ baseline date is February 8, 1988. The PSD minor source NO₂ baseline date for the impact area is April 12, 1991. The baseline concentration, the reference point for air quality deterioration under the PSD program, is defined as the air quality at the time the first complete PSD application is received for an area. For major sources, all actual emissions associated with construction (i.e., physical changes or changes in the method of operation) after the major source baseline date affect increment. Because Southern LNG has not operated since 1982, emissions associated with the total facility operation appear to consume PSD increment and should be included in future PSD impact modeling in the area.
- e. Impact Modeling Site Boundary - Figures D-3 through D-5 and the plot plan provided in the application show a fenced area about the facility that does not include the total island. As the application acknowledges, the public can access Elba Island via the Savannah River or South Channel. Evaluations of site boundaries for other facilities have determined that a shoreline by itself is not a sufficient barrier to public access to qualify the land area as non-ambient air for impact modeling. Therefore, to consider the total island as non-ambient air, additional "barrier(s)" to the public are needed along the shorelines.
- f. Load Modeling - The application states, without supporting information, that modeling analysis to determine worst impact under various loads was determined to be unnecessary. Although the modeling protocol indicates only the generators will operate at reduced loads, no other reason is given to justify not considering load in determining the worst case impact.

- g. Emission Inventories - The selected other emission sources used in the national ambient air quality standards and PSD increment compliance modeling are

provided in Table D-1 of the permit application. The following are comments/questions concerning the inventories:

- All emission units from each source were combined into one representative emission point independent of the source's location. This technique is appropriate for sources with only one set of available coordinates or sources located a considerable distance from the significant impact area. The relative location of emission points becomes important the closer the source is to the Elba Island terminal. To determine the importance of this issue in the provided impact analysis, the location of each emission unit within the significant impact area should be provided for each emission source.
- Table D-1 of the permit application does not distinguish PSD emission sources. The PSD sources should be identified.
- Tanker unloading will occur approximately once per week. Unloading pumps will be maintained and powered by the tanker's power source. This secondary emission source was not included in the ambient air quality impact assessment. Because of the frequency and stationary nature of the tanker while unloading, tanker emissions during unloading should be considered for inclusion in all impact assessments.

- h. Ozone Ambient Conditions - Total VOC emissions from the Elba Island terminal are greater than the PSD significant emission rate. Although ozone impact modeling is not normally required for single sources, information on the current ozone levels in the area should be cited to provide qualitative assurance that the increased VOC emissions from facility operation will not cause or contribute to violations of the ozone national ambient air quality standards.

If you have any questions concerning comments not related to the air impact assessment, please contact Darren Palmer at (404) 562-9052 or Jim Little at (404) 562-9118. Questions concerning our comments on the air impact assessment should be directed to Stan Krivo at (404) 562-9123.

Sincerely,

R. Douglas Neeley
Chief
Air and Radiation Technology Branch
Air, Pesticides and Toxics
Management Division

Exhibit 1
Attachment 19

User Name: LAURAMONA
Date and Time: 2013-02-06 3:49 PM EST
Job Number: 1957278

Document(1)

1. Cmtys. for a Better Environment v. Cenco Ref. Co., 179 F. Supp. 2d 1128

Client/matter: 3826-0000202



Positive
As of: February 6, 2013 3:49 PM EST

Cmtys. for a Better Environment v. Cenco Ref. Co.

United States District Court for the Central District of California
September 26, 2001, Decided ; September 26, 2001, Filed, Entered
CASE NO. CV 00-5665 AHM (AIJx)

Reporter: 179 F. Supp. 2d 1128; 2001 U.S. Dist. LEXIS 16249; 53 ERC (BNA) 1552

COMMUNITIES FOR A BETTER ENVIRONMENT, Plaintiff, v. CENCO REFINING COMPANY, et al., Defendants.

Notice:

Disposition: **[**1]** CBE'S MOTION FOR SUMMARY ADJUDICATION AND PERMANENT INJUNCTION DENIED AND CBE'S MOTION FOR PRELIMINARY INJUNCTION GRANTED.

Core Terms

refinery, emissions, refining, shutdown, expired, void, modifications, permanently, reinstated, fuel, crude oil, zero, reactivated, ownership, restart, dismantle, resuming, emit, new source, baseline, injunction, suspension, preliminary injunction, modified, flanged, suspended, disconnected, inspections, permittee, shutting

Case Summary

Procedural Posture

Plaintiff environmental organization moved for partial summary adjudication and a permanent injunction, or in the alternative, a preliminary injunction in its action against defendant corporations alleging failure to comply with the Clean Air Act.

Overview

An environmental organization brought an action against corporations alleging failure to comply with the Clean Air Act by neglecting to ap-

ply new source review (NSR) to the corporations' crude oil refinery. The environmental organization moved for partial summary adjudication and a permanent injunction, or a preliminary injunction, claiming that the corporations violated the state implementation plan by failing to void the refinery's facility permit, that NSR should have been applied to the refinery due to its six year shutdown, and that the corporations violated state implementation rules. The court denied summary judgment and a permanent injunction, holding that the environmental organization failed, as a matter of law, to demonstrate that alterations to some of the refinery equipment voided the facility permit or required the application of NSR to the facility as a whole. The court granted the motion for a preliminary injunction, holding that the environmental organization made a showing sufficient to warrant a preliminary injunction on its claim that the refinery's six year long shutdown, in conjunction with its physical modifications, required NSR for the entire facility.

Outcome

The motion for a preliminary injunction was granted.

LexisNexis® Headnotes

Environmental Law > Air Quality > General Overview
Governments > State & Territorial Governments > Licenses

HNI See [Cal. Health & Safety Code § 42301\(f\)](#).

Environmental Law > Air Quality > General Overview
 Environmental Law > Air Quality > State Implementation Plans

HN2 See 40 C.F.R. § 51.165(a)(1)(v)(C)(6).

Civil Procedure > Remedies > Damages > Monetary Damages
 Environmental Law > Administrative Proceedings & Litigation > Remedies > Damages

HN3 Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least long of duration, i.e., irreparable.

Civil Procedure > Remedies > Injunctions > General Overview
 Environmental Law > Administrative Proceedings & Litigation > Remedies > Damages

HN4 When environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Counsel: For COMMUNITIES FOR A BETTER ENVIRONMENT, plaintiff: David A Rosen, Gideon Kracov, Rose Klein & Marias, Los Angeles, CA.

For COMMUNITIES FOR A BETTER ENVIRONMENT, plaintiff: Richard T Drury, Anne E Simon, William B Rostov, Communities For A Better Environment, San Francisco, CA.

For COMMUNITIES FOR A BETTER ENVIRONMENT, plaintiff: Everett L DeLano, III, Everett L Delano III Law Offices, Escondido, CA.

For COMMUNITIES FOR A BETTER ENVIRONMENT, plaintiff: J Scott Kuhn, Communities for a Better Environment, Huntington Park, CA.

For CENCO REFINING COMPANY, CENCO INC, ROBERTSON CHARITABLE REMAINDER UNITRUST, defendants: Evelyn F Heidelberg, Robert H Conrad, Jr, Latham & Watkins, Los Angeles, CA.

For CENCO REFINING COMPANY, CENCO INC, ROBERTSON CHARITABLE REMAINDER UNITRUST, defendants: Dean G Dunlavey, Michael James Carroll, Latham & Watkins, Costa Mesa, CA.

For SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, BARRY R WALLERSTEIN, WILLIAM A BURKE, Dr, NORMA J GLOVER, MICHAEL D ANTONOVICH, HAL BERNSON, CYNTHIA P COAD, BEATRICE JS LAPISTO-KIRTLEY, [**2] RONALD O LOVERIDGE, JON D MIKELS, LEONARD PAULITZ, S ROY WILSON, Dr, defendants: Gene Tanaka, Piero C Dallarda, Jennifer T Buckman, Best Best & Krieger, Riverside, CA.

For SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, BARRY R WALLERSTEIN, WILLIAM A BURKE, Dr, NORMA J GLOVER, MICHAEL D ANTONOVICH, HAL BERNSON, CYNTHIA P COAD, BEATRICE JS LAPISTO-KIRTLEY, RONALD O LOVERIDGE, JON D MIKELS, LEONARD PAULITZ, S ROY WILSON, Dr, defendants: Barbara B Baird, Kurt R Wiese, South Coast Air Quality Management District, Diamond Bar, CA.

For SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, defendant: Gloria L White-Brown, South Coast Air Quality Management District, Diamond Bar, CA.

For CENCO INC, defendant: Kurt Weissmuller, Deanne L Miller, Jocelyn D N Thompson, Kathleen A Kenealy, Weston Benshoof Rochefort Rubalcava & MacCuish, Los Angeles, CA.

For SANTE FE SPRINGS CITY OF, defendant: Colin Lennard, Patricia Jean Chen, Fulbright & Jaworski, Los Angeles, CA.

For SANTE FE SPRINGS CITY OF, defendant: Steven Neil Skolnik, Steven N Skolnik Law Offices, Santa Monica, CA.

Judges: A. Howard Matz, United States District Judge.

Opinion by: A. Howard Matz

Opinion

[*1131] ORDER DENYING CBE'S MOTION FOR SUMMARY [*3] ADJUDICATION AND PERMANENT INJUNCTION AND GRANTING CBE'S MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

I. INTRODUCTION

II. FACTS

III. DISCUSSION

A. Alleged Violations of the Clean Air Act

1. The Mere Change of Ownership Did Not Void The Refinery's Permit
2. Alterations Made To Some Refinery Equipment, Standing Alone, Did Not Void The Refinery's Permit

- a. Types of Alteration
- b. Increase in Emissions: The Proper Baseline
- c. Summary: Alterations

3. The Six-Year Shutdown of the Facility, in Conjunction with Refinery Modifications, Triggers New Source Review Under the Clean Air Act

- a. CBE Has Made a Strong Showing That Rule 209 Voids Permits for Equipment That Has Been Permanently Shutdown
- b. CBE Has Made a Strong Showing That the Factors in EPA's Reactivation Policy (Concerning the Application of NSR to Permanently Shutdown Facili-

ties) May Be Taken into Account In Interpreting the Clean Air Act

c. CBE Has Made a Strong Showing That the Refinery Was Permanently Shutdown Under Rule 209

i. Two Years or More of Non-operation

ii. Reason for Shutdown

iii. Intent and Plans to Restart

iv. Cost and Time Required [*4] to Reactivate

[*1132] v. Status of Permits

vi. Ongoing Maintenance and Inspections

vii. Summary

4. Miscellaneous SIP Provisions

B. Relief

IV. CONCLUSION

I. INTRODUCTION

This action is before the Court on the motion of Plaintiff Communities for a Better Environment ("CBE") for partial summary adjudication and a permanent injunction, or in the alternative, a preliminary injunction. As described in this Court's June 2001 Order denying defendants' motions to dismiss, CBE alleges that Cenco Refining Company ("Cenco") and the South Coast Air Quality Management District ("SCAQMD") have failed to comply with the Clean Air Act by neglecting to apply New Source Review ("NSR") to Cenco's Santa Fe Springs crude oil refinery.

CBE asserts the following grounds for its mo-

tion.¹ First, CBE asserts that Defendants violated the California State Implementation Plan ("SIP") by failing to void the Refinery's Facility Permit when it was transferred to Cenco and when Refinery equipment was altered. CBE argues that if the Permit were properly voided, NSR would apply to the Refinery. Second, CBE asserts that Defendants should have applied NSR to the Refinery under the SIP and the EPA's [**5] Reactivation Policy because the prior Refinery owner permanently shutdown the facility and it has been non-operational for six years. Finally, CBE asserts that Defendants violated several other miscellaneous SIP provisions: Rule 2005(c)(2) requiring that a facility hold sufficient RECLAIM trading credits to offset facility emissions for the first year of operation (FAC Fifth Cause of Action); Rule 210 prohibiting construction without first complying with NSR (FAC Seventh Cause of Action); Rule 210 prohibiting submission of incomplete or inaccurate information - here, failure to submit materials required by NSR - to SCAQMD (FAC Seventh Cause of Action); and Rule 212 requiring a 30 day Public Comment period for grants of permits (FAC Second Cause of Action).

[**6] In its motion, CBE seeks summary adjudication of its First, Second, Fourth, Fifth and Seventh Causes of Action (*see* Proposed Judgment) and

a permanent injunction requiring Cenco and SCAQMD to conduct a public NSR process, including an alternatives analysis, to install BACT prior to commencing operations, to offset its emissions, and ordering SCAQMD to rescind Cenco's facility permit until such time as it completes the NSR process. Alternatively, if the Court finds there are any material facts genuinely at issue, CBE re-

quests a [*1133] preliminary injunction prohibiting Defendants from taking actions in furtherance of construction or operation of the facility and requiring SCAQMD to rescind Cenco's permits pending trial.

Motion, pp. 2-3.

For the reasons set forth below, the Court DENIES CBE's Motion for summary adjudication and a permanent injunction. Defendants have raised triable issues as to all of CBE's claims. Moreover, the Court DENIES CBE's motion for a preliminary injunction based on CBE's claims that either the transfer of the facility permit, standing alone, or the specific alterations to the facility, standing alone, violated the SIP and triggered NSR. However, [**7] the Court finds that CBE has made a showing sufficient to warrant a preliminary injunction on its claim that the Refinery's six year long shutdown, in conjunction with its physical modifications, required NSR for the entire facility; the motion is GRANTED on this ground.

II. FACTS

This case involves a crude oil refinery located at 12345 Lakeland Road, Santa Fe Springs, in southeastern Los Angeles County. Plaintiff's Statement of Uncontroverted Facts ("PSUP") 1. Immediately prior to August 1998, the refinery was owned by Powerine Oil Company. *Id.* at 2. In June 1995, Powerine wrote SCAQMD that it would be shutting down its refinery beginning the first week in July, 1995. *Id.* at 8. Powerine suspended all refining operations on July 3, 1995 and has not refined crude oil since that date. *Id.* at 9.

In September 1995, Powerine's parent company, Castle Energy, entered into a contract for the sale of the refinery equipment to Kenyen

¹ In its opening motion, CBE asserts first that it has organizational standing to bring this action. Defendant's opposition brief does not challenge CBE's showing. In its prior Order denying Defendants' Motions to Dismiss, this Court stated that "for the guidance of the parties, the Court notes that even if the motions to dismiss were converted to motions for summary judgment, plaintiffs' standing showing would still likely be sufficient." The Court's inclination was based on declarations from CBE members and citizens of the city of Santa Fe Springs stating that they had apprehended chemical odors emanating from the facility. The Court finds that CBE has standing to sue on this basis. Plaintiff's Statement of Uncontroverted Facts 36 (describing declarations of CBE members who have apprehended odors).

Projects Ltd. Id. at 10; Defendants' Additional Material Facts ("DAMF") 56-57. Under the contract, the refinery equipment would be dismantled and shipped to India. DSUF 11; DAMF 56. Powerine informed certain regulatory authorities that it had sold its refinery equipment and that the equipment would be dismantled and shipped to India. PSUF 11. In October 1995, Powerine informed SCAQMD that it was "in the process of shutting down the refinery for its ultimate dismantling" and that Powerine's new parent company planned to dismantle the refinery. Id. at 12-13. Also in October 1995, Powerine applied to SCAQMD to obtain Emission Reduction Credits. Id. at 14. Finally, Powerine repeatedly requested suspension of regulatory reporting requirements on the basis that the refinery had suspended operations. Id. at 41.

Powerine's then-Chief Financial Officer declares that although Powerine accepted Kenyen's proposal, Powerine's management disagreed with the Kenyen deal, expressed concerns to Castle that the Kenyen deal was unlikely to be successfully implemented and requested that a deal be reached with another company, Energy Merchant Corporation, so that refining operations could be resumed. Egner Decl. 4-5.

In December 1995, Powerine informed various state entities, including the Los Angeles Regional Water Quality Control Board, that the refinery might be resuming crude oil processing. DAMF 60. It informed the Regional Water Quality Control Board [**9] that Powerine was negotiating with a prospective buyer who "planned to bring the refinery back in operation, and rehire the majority of 350 laid off employees" and "desired to purchase the refinery equipment back from Kenyen Projects Ltd, the firm which purchased the refinery equipment and had been making plans to dismantle the refinery equipment and transport it to India." Christman Decl., Exh.16.

[*1134] In January 1996, Energy Merchant Corporation purchased Powerine's stock, thus divesting Castle Energy of ownership. DAMF 63. Michael Egner and June Christman, the then-Environmental Engineering Manager for Powerine, declare that Powerine "acquired Kenyen's rights to the refinery equipment" in February 1996. Egner Decl. 7; Christman Decl. 8. ² In February 1996, Powerine submitted a letter to SCAQMD requesting cancellation of its application for Emission Reduction Credits, and stated that Energy Merchant Corporation had "the ultimate goal of operating the refinery again." Christman Decl., Exh.20.

[**10] Throughout the period of time crude oil refining was suspended, Powerine kept in force the permits it had secured from other agencies, including the Los Angeles Regional Water Quality Control Board and the Los Angeles County Sanitation District. DAMF 67.

Powerine demolished a 28,000 square foot main office building, a warehouse, truck fuel loading racks, tanks and associated equipment, and sold the property on which the equipment was located. PSUF 17. It is not clear when this occurred or who owned the facility at the time. In 1997, Powerine informed SCAQMD that it had disconnected all fuel feed lines and disconnected and flanged a process feed line or removed a major component of the process for all RECLAIM sources. Id. at 60.

June Christman declares that from 1995 to 1998, Powerine employed two dozen employees at the facility and did use some equipment at the facility, such as utility, storage, wastewater treatment, stormwater management and emergency equipment. DAMF 68. She also declares that the refinery processed remaining sour water through November 1995; processed butane into isobutane at the refinery from May to August 1996; and resumed refining activity with the reformat [**11] splitter to produce diesel fuel during September 1996. However, in an unrelated lawsuit, the California

² CBE objects to the declarations on the ground that no contractual agreement has been provided to the Court. The objection is overruled. The "Best Evidence Rule" does not preclude the admission of this evidence, at least not in the absence of a concrete challenge to the factual accuracy of these statements.

Supreme Court stated that since 1995, the facility "has not been operated at all, and only a skeleton crew of employees has remained, primarily for environmental compliance and equipment maintenance purposes." Certain Underwriters at Lloyd's of London v. Superior Court, 24 Cal. 4th 945, 951 (2001). Moreover, Cenco informed the Securities and Exchange Commission ("SEC") in 1998 that "the refinery has had no operations since July 1995" and that "currently, the refinery has a skeleton staff that oversees the maintenance of its assets, which consist of an oil refinery and related assets." Reply Request for Judicial Notice, Exh.4. Defendants do not dispute that the facility has not refined crude oil since 1995. PSUF 9.

Several times between 1995 and 1998, the SCAQMD Fee Review Committee addressed whether the annual and emission permit fees paid by Powerine regarding its refinery in Santa Fe Springs were current. Each time the Fee Review Committee addressed this question during this period, it concluded that Powerine's permits were either active or, when they expired, [**12] were timely reinstated. DAMF 12. Powerine repeatedly expressed its intent to resume crude oil refining to the District's Fee Review Committee. For example, in a series of letters to the District during the 1996 through 1998 time period, Powerine [**1135] repeatedly explained that it was committed to resuming refining activities. Id. at 13. Due to cash flow constraints, Powerine asked for several extensions of time for pending financing arrangements to be completed. The District granted these requested extensions. Powerine paid its fees as it obtained revenues to do so. On July 31, 1996, Powerine sent a letter to the District's Fee Review Committee, forwarding checks totaling \$ 91,235.67, which, when added to Powerine's credit with the District for \$ 33,764.33, totaled \$ 125,000, the amount of Powerine's second payment for past due fees. Id. at 14. From July 1995 through July 30, 1998, Powerine paid SCAQMD \$ 207,396.08 for its annual permit fees and \$ 58,126.75 for emission fees necessary to keep the permits active. Id. at 16. SCAQMD, in a December 17, 1997 letter, informed Powerine that Powerine

could allow the permits to expire. The permits would not be permanently revoked if Powerine paid [**13] a 15% penalty within one year. Id. at 16. In a letter to the District dated January 28, 1998, Powerine accepted the District's proposal and allowed its permits to expire subject to the understanding that they could be reinstated upon payment of a 15% penalty within one year. Id. at 17.

In July 1998, Powerine applied to SCAQMD to reactivate its expired permits. Mueller Decl. 3. In August 1998, Cenco formally purchased the refinery from Powerine, PSUF 21. In October 1998, Cenco applied for a change of ownership for Powerine's equipment. On December 29, 1998, SCAQMD reactivated Powerine's expired permit to operate. PSUF 26. Although the timing is disputed, at some point between October 1998 and January 1999, SCAQMD made Cenco the holder of the refinery facility permit. DAMF 46.

SCAQMD reactivated the facility permit based on its investigation of the facility's operations from 1995-1998, Powerine's efforts to keep its permits alive during that period, and SCAQMD's inspections of refinery equipment in 1998. DAMF 18-25. Regarding the condition of refinery equipment in 1998, CBE proffers a 1998 letter from SCAQMD to Powerine indicating that its inspection "found that several pieces of refinery [**14] equipment were altered, dismantled or removed" and a December 1998 stipulation between Cenco and SCAQMD reciting that inspections "indicated a general state of disrepair of the refinery equipment." PSUF 60-61. CBE also introduces a letter from Cenco to the SEC in 1998 stating that "the Refinery's assets are not in working condition 'as is.' Significant capital improvements and other turnaround costs will be incurred before refining can commence." Reply RJN, Exh.4.

Defendants counter with the declaration of Roger Christopher, the SCAQMD Supervising Air Quality Inspector in the Petroleum and Refinery Unit, who inspected the Powerine refinery on August 7, 1998. He found that the "refinery's equipment was in substantially the same

condition as it had been in 1989" and that it was not "so dilapidated that it could not be operated." Christopher Decl. 5; DAMF 23-24. He declares that "the refinery was fully capable of being operated by reconnecting fuel supply lines that provided fuel gas to power refinery equipment and by draining off nitrogen that had been injected into most of the equipment to prevent rust." Christopher Decl., 5, 6. ³ Moreover, none of the equipment at the [*1136] Powerine refinery [*15] had been flanged-off, other than blind flanges on the fuel gas lines, which could be easily removed. Powerine had flanged off the fuel gas lines by removing a piece of piping or a valve and bolting a flange over the open end of the pipe. Blind flanges are often put in place on fuel gas lines for equipment that has been temporarily removed from operation so that the equipment may qualify for less stringent emissions reporting requirements under SCAQMD's RECLAIM program. Christopher Decl., 7.

Since purchasing the refinery in August 1998, Cenco has operated a flare, fuel gas system, fire water system, effluent water treatment system, cooling water system, and plant air system. DAMF 70.

Since its purchase, Cenco has applied to SCAQMD, the City of Santa Fe Springs, and the State Water Board for the permits necessary to operate the refinery. PSUF 22. In September 1998, the City issued a conditional use permit to [*16] Cenco that required the refinery to make health and safety modifications to the refinery. Id. at 64; See Exh. J to Mueller Decl. One condition is that Cenco convert the refinery's existing alkylation unit (this unit is "critical to the production of clean, reformulated fuels which meet the requirements of the Clean Air Act," DAMF 66) to an entirely new process called "modified HF." PSUF 66-67. Moreover, the City required Cenco to use a new Rapid Acid Transfer System in conjunction with the modified HF process. Id. at

71. Because the Refinery cannot currently manufacture gasoline in compliance with state regulations, Cenco must make modifications to enable the refinery to manufacture reformulated fuels in compliance with State regulations. Id. at 78.

Cenco has never submitted an alternatives analysis ⁴ to SCAQMD as described in Rules 2005 and 1303 to SCAQMD, PSUF 111. Cenco has not installed BACT nor has it proposed to install BACT on every emission source at the refinery. Id. at 112.

[**17] Based on its inspectors' audits of the equipment and analysis of other facts it gathered, as well as an analysis of whether the above-discussed facts fall within EPA's Reactivation Policy (see below), the District concluded that some of Powerine's permits could be reactivated consistent with SCAQMD rules and EPA policy. DAMF 30, Mueller Decl., 10, 13 and Exh. E thereto. As to equipment that SCAQMD found to be modified or altered, SCAQMD refused to reactivate permits and required Powerine to undergo NSR before a permit could be issued for such equipment. DAMF 28; Mueller Decl., 10 and Exh. C (August 26, 1998 Letter from SCAQMD to Powerine) and Attachment A thereto (specifying altered, dismantled or removed equipment for which permits could not be reactivated); Christopher Decl., 8, 9 and Exh. 1 and Attachment A thereto.

Based on its inspectors' audit of the equipment at the Powerine refinery, SCAQMD refused to reinstate permits to construct for which Powerine had not initiated construction. CENCO filed permit applications for this equipment as part of the 47 applications it later filed, and the SCAQMD further evaluated them through NSR, DAMF 29; Mueller Decl., 10 and Exh. C thereto.

[**18] [*1137] Of the 47 CENCO Refinery Upgrade Project permit applications, SCAQMD

³ CBE objects to Christopher's declaration as improper opinion testimony. This objection is overruled.

⁴ Rule 1303(b)(5)(A) defines "alternative analysis" as "an analysis of sites, sizes, production processes, and environmental control techniques for such proposed source and demonstrate that the benefits of the proposed project outweigh the environmental and social costs associated with that project."

applied NSR only to modifications that were found to increase emissions. Vo Decl., 5-7 and Exh. 11. Apparently, in determining whether equipment increased emissions, SCAQMD looked to a baseline consistent with the facility's emissions before the suspension of operations in 1995. Vo. Decl. Exh. 11.

III. DISCUSSION

A. Alleged Violations of the Clean Air Act

1. The Mere Change of Ownership Did Not Void The Refinery's Permit

SCAQMD Rule 209 provides that:

[a] permit shall not be transferable, whether by operation of law or otherwise, from one location to another, from one piece of equipment to another, or from one person to another. When equipment which has been granted a permit is altered, changes location, or no longer will be operated by the permittee, the permit shall become void.

In its opening motion, CEE asserts that "on January 15, 1999 SCAQMD transferred Powerine's facility permit to Cenco" and that this transfer of ownership "voids" the permit under Rule 209. Motion, p. 9. However, in its Reply, CBE states that "it was not the mere change in ownership" that violated the Clean Air Act, **[**19]** "but rather the refinery's shutdown, al-

teration, deterioration, and Cenco's plans to start operations and construction of a modified refinery." Reply, p.6 (emphasis added).

The Court finds that a mere change in ownership of equipment does not void that equipment's permit under Rule 209. The Court instead adopts Defendants' interpretation of the SIP provision: "Rule 209 prevents a permit transfer from one person to another *without applying to the District.*" Opposition, p.8.

First, this reading of Rule 209 harmonizes the Rule with other SIP provisions and California statutory law. District Rule 301.1 expressly contemplates revision of permits to reflect changes in ownership:

When an application for change of ownership of a permit to operate or an emission reduction credit certificate is filed within 24 months of the date of transfer, and there has been no change of operation and a permit to operate or an emission reduction credit certificate had previously been granted and has not otherwise expired, ⁵ the applicant shall pay a filing fee of \$ 110 for each permit.

[*1138] Moreover, while District Rule 1303(b) subjects changes in the "method of operation" of equipment to **[**20]** NSR, Rule 1302 specifically excludes changes in operators from the definition of "changes

⁵ At the hearing, CBE argued that Rule 209 "trumps" Rule 301 such that the meaning of Rule 209 should not be limited by any language in Rule 301. CBE relies on subsection 301(d)(1) which provides that

the Executive Officer shall establish an annual operating fee due date for each permittee for all permits associated with the same premises. Thereafter, All Permits to Operate ... shall be renewable as set forth below, on the annual operating fee due date set by the Executive Officer for all permits associated with the same premises subject to *any other requirements of these rules and regulations or state law, regarding validity, voiding or revocation of permits.* Although Rule 209 does provide for "voiding" of permits, subsection 301(d)(1) does not mean that Rule 209 cannot be read in light of Rule 301. Instead, subsection 301(d)(1) appears to mean simply that annual permit renewal is not automatic if a permit was invalidated under another rule. The provision by no means precludes the Court from favoring a construction of Rule 209 that is consistent with Rule 301.1's clear endorsement of changes of ownership. Moreover, CBE's understanding of the relationship between Rule 209 and Rule 301 compels an interpretation of Rule 209 (that it altogether bars changes of ownership) that not even CBE adopts.

CBE asserts that the Refinery's facility permit had previously expired and that there will be a change in operation, making Rule 301.1 inapplicable. However, SCAQMD apparently reactivated the permit before it approved the change in operator. The Court addresses CBE's challenge to the validity of the reactivation elsewhere in this order. The Court also deals with CBE's allegation of a change in operation elsewhere.

in the method of operation": "[a] change in the method of operation of equipment, unless previously limited by an enforceable permit condition,⁶ shall not include ... a change in the operator of the facility."

Finally, *HNI California Health & Safety Code § 42301(f)* provides that an air district's permitting system shall:

provide for the reissuance or transfer of a permit to a new owner or operator of an article, machine, equipment, or contrivance ... However, under no circumstances shall the criteria [for issuing the permits] specify that a change in ownership or operator alone is a basis for requiring more stringent emission controls or operating conditions than would otherwise apply to the article, machine, equipment or contrivance.

These provisions of the SIP, which includes Rule 209, and state law provisions are consistent with Defendants' interpretation of Rule 209 and appear to conflict with a bar to [**22] changes in ownership.

Moreover, Defendants' plain language reading of Rule 209 makes sense. They contend that Rule 209's prohibition against permit transfers without applying to the District serves to "ensure that the District has, at all times, a record of the current owner for notice and cita-

tion purposes." Opposition, p.8; Thompson Decl. 4, 8-9; Muller Decl. 4. CBE neither disputes that this represents a sensible explanation of Rule 209's purpose nor proffers any practical justification for interpreting that Rule as a *per se* bar to changes in operators.

Defendants add that CBE's interpretation of Rule 209 would be "unworkable as a practical matter" because "each month, the District processes approximately 150 applications for change of ownership/operator" and the application process is "ministerial"; "if these applications were all subject to NSR, the District's permitting operations would be thrown into chaos." Thompson Decl. 4, 6-7; Mueller Decl. 11. Defendants also assert that "CBE's interpretation would render much equipment throughout the South Coast District valueless"; "the cost of conducting NSR and upgrading the equipment with EACT would in many cases be prohibitive [**23] and require scrapping the equipment instead of selling it." Opposition, p.11; Mueller Decl. 11; Coy Decl. 8.

In light of Rule 209's language, the governing statutory scheme, practical considerations, and CBE's express acknowledgment that "it was not a mere change in ownership" that required new source review under the Clean Air Act, the Court declines to find that the mere change in owner of the Powerine refinery voided the refinery's permit.⁷

[**24] [*1139] 2. Alterations Made To Some Refinery Equipment, Standing Alone, Did

⁶ CBE asserts that Rule 209 represents an enforceable permit condition and suggests that Rule 209 does make a mere change in ownership a "change in method of operation." However, Rule 209 provides no such equivalence. Moreover, if Rule 209 did so provide it would nullify the quoted clause from Rule 1302 because a change in ownership would always be a change in method of operation.

⁷ The Court rejects CBE's contention that the EPA's notice of violation to Cenco compels accepting CBE's interpretation of Rule 209. Although the notice of violation did state that "under District Rule 209, the permits became void when Powerine attempted to transfer its permits to Cenco in August 1998," notices of violation are not proof of anything. See *Air California v. United States Dept. of Transportation*, 654 F.2d 616, 620 (9th Cir. 1981) (the only effect of a notice of violation by EPA is to "trigger the statutory mechanism for informal accommodation which precedes any formal enforcement measures"). Moreover, the NOV appears to rely on either a mistaken or different version of Rule 209 than the one enacted into the SIP. The NOV states that Rule 209 provides that "When equipment which has been granted a permit is altered, changes location, *changes ownership* or no longer will be operated by the permittee, the permit becomes void." Exh. C to Kuhn Decl., p.12 (emphasis added). The italicized language is not part of SIP-approved Rule 209. Additionally, the NOV does not mention Rule 301 or attempt to harmonize Rule 209 with other SIP provisions. Next, as Defendants note, EPA has not pursued its initial allegations regarding Rule 209 against Cenco but has instead entered into a stipulated consent decree. The United States' complaint against Cenco relies on numerous provisions of the SIP but does not even mention Rule 209. Finally, SCAQMD has never read its own Rule 209 to void a permit in a change of operator transaction. Thompson Decl. 8. For all these reasons, and the Court's basis, explained above, for adopting De-

Not Void The Refinery's Permit

a. Types of Alteration

CBE contends that the facility permit became void because under Rule 209 facility equipment was "altered" in four ways. First, Powerine "disconnected all fuel feed lines and disconnected and flanged a process feed line or removed a major component of the process for all of its RECLAIM sources." PSUF 60. Second, Powerine demolished a 28,000 square foot main office building, a warehouse, truck fuel loading racks, tanks and associated equipment, and sold the property on which the equipment was located. *Id.* at 17. Third, "the refinery fell into a state of disrepair due to non-use." Motion, p.11; PSUF 61-62. Fourth, prior to SCAQMD's issuance of a facility permit to Cenco, the City issued a Conditional Use Permit ("CUP") to Cenco containing 57 separate conditions of approval which required Cenco to make numerous modifications to the refinery. PSUF 64-65, 71-72, 77-79.

Defendants respond that the specific asserted changes to facility equipment either did not increase emissions, in which event NSR was not required under the SIP, or were in fact subjected to NSR. [**25] They rely on Rule 1303(b), which provides that "the Executive Officer shall, except as Rule 1304 applies, deny the Permit to Construct for any new or modified source which results in a net emission increase of any nonattainment air contaminant at a facility, unless each of the following requirements are met ..." and then proceeds to list NSR requirements. According to defendants, the disconnecting and flanging of fuel lines did not result in emissions increases, but instead were "temporary measures taken in recognition of the fact that the equipment was temporarily non-operational." Opposition, p.15. The demolition of the office building was not subject to NSR because "demolition of equipment is not subject to NSR and the demolished office building never required a permit in the first place." The new truck loading rack replacing the demolished rack was subjected to NSR. Opposition,

p.15; Vo Decl. 3, Exh.11. Regarding the alleged equipment disrepair, Defendants submit evidence to show that the equipment for which permits were reinstated was "largely in working order." Christopher Decl. 3-4. Finally, Defendants assert that the modifications required by the City's CUP were all subjected [**26] to NSR if they increased emissions. Vo Decl. 4, Exh.12.

[*1140] The Court must determine whether under the SIP the NSR requirement applies to alterations or modifications only if there is an increase in emissions. Rule 209 does not expressly confront the issue; it says nothing about NSR. But Rules 1303 and 2005 do indicate that NSR applies to modifications or alterations accompanied by emissions increases. *See* Rules 1303(a)(1); 2005(c)(1) ("the Executive Officer shall not approve an application for a Facility Permit Amendment to authorize the installation of a new source or modification of an existing source which results in an emission increase as defined in subdivision (d), unless the applicant demonstrates that: [BACT] will be applied to the source ..."). CBE appears to acknowledge that Rules 1303 and 2005, the SIP Rules that discuss NSR, do dictate that NSR apply to emissions increases. Motion, p.13; Reply, p.8 (arguing that NSR applies because "the proper baseline emissions for NSR purposes for the refinery was zero emissions"). Indeed, CBE does not explain what role Rules 1303 and 2005 would serve if Rule 209 requires that any modification or alteration calls for NSR, regardless [**27] of whether there was an increase in emissions.

In light of Rules 1303 and 2005, the Court finds Defendants' reading of the "alteration" clause in Rule 209 persuasive: "Rule 209 applies only (a) when an owner of permitted equipment alters the equipment such that the alteration results in a discrepancy between the equipment and the equipment description in the permit ..." DAMF 31. This interpretation is consistent with Rule 209's purpose to ensure that SCAQMD maintains accurate records of permitted equipment, who possesses the equip-

ment and exactly how that equipment is characterized. In other words, as with transfers, it is those alterations that are unreported to SCAQMD that automatically void equipment permits. NSR, on the other hand, is required when alterations raise emissions.

b. Increase in Emissions: The Proper Baseline

CBE next argues that the alterations to refinery equipment *did* increase emissions and so under Rules 209, 1303 and 2005 they did require NSR because the shutdown facility's "baseline" emissions were zero. Reply, p.8. CBE relies on the definition of emissions increase in Rule 2005(d) ⁸: "an increase in emissions occurs if a source's maximum hourly potential [**28] to emit immediately prior to the proposed modification is less than the source's post-modification maximum hourly potential to emit." CBE asserts that "immediately prior" to the alterations and proposed alterations, the facility's potential to emit was zero because 1) the permit to operate had expired on January 31, 1998, leaving no legal opportunity to emit and 2) actual emissions had been zero since 1995, when the facility suspended refining operations. Therefore, any resumption of operations following any alterations would increase emissions over the baseline of zero.

The Court rejects CBE's first argument. The mere fact that in 1998 Powerine voluntarily let its facility permit expire for failure to pay fees does not compel finding that NSR applies to the facility based on a zero emissions baseline. SIP Rule 301(d)(7) provides that a "permit which has expired due to non-payment of fees *may* be reinstated only by submitting a new application [**29] for permit accompanied by an application fee and the payment in full of the amount of fees due at the time the previous permit expired, if such reinstatement request is made within 24 months of the [*1141]

date of expiration." (emphasis added). Under Rule 301, SCAQMD need not treat a source as a new source subject to NSR, as if going through permitting for the first time, just because a permit expired due to non-payment of fees, instead, the expired permit may simply be reinstated upon payment of the fee. The issue is money, not operability. Indeed, here, Powerine allowed its permit to expire with the express understanding from SCAQMD that SCAQMD *would* reinstate the permit later under Rule 301 if Powerine paid fees within a year. DAMF 16-17.

CBE's interpretation of 2005 would appear to nullify 301(d)(7) because it would require all equipment whose permit has expired, no matter how recently, to be treated as a new source subject to NSR, notwithstanding that Rule 301(d)(7) contemplates reinstatement of *old* and expired permits. The Court rejects this reading in light of Rule 301(d)(7). ⁹

[**30] CBE's alternative argument, that the refinery's emission baseline is zero in light of five years of non-emission, is weak. CBE accepts Rule 2005(d) as providing the definition of an emissions increase due to an alteration under the SIP. Reply, p.8. That Rule clearly provides that an emissions increase occurs if a source's "*potential to emit*" increases with an alteration or modification. Rule 1302(y) defines "potential to emit" as "the amount of pollutants calculated (1) using a calendar monthly average and, (2) on a pound-per-day basis from permit conditions which directly limit the emissions, or when non such conditions are imposed, from: (1) the maximum rated capacity; and (2) the maximum daily hours of operation; and (3) the physical characteristics of the materials processed." CBE appears to argue that the refinery's potential to emit prior to the alleged alterations and modifications was zero because starting in 1995 its actual emissions were zero.

⁸ Rule 1303 does not include a definition of emissions increase.

⁹ CBE correctly points out that under Rule 1302(y), potential to emit is calculated "from permit conditions which directly limit the emissions." CBE takes the quoted language to mean that if a permit has expired, then emissions are limited to zero and potential to emit must be zero. Read reasonably and in context, the quoted language of Rule 1302(y) means simply that if a permit governing a certain piece of equipment expressly limits emissions in a certain way, potential to emit should not be calculated without taking that specific limit into account.

But the mere fact that the facility was not actually emitting immediately prior to alterations does not mean it had no potential to emit at that time. Indeed, the federal regulations and cases discussing them that CBE relies on [**31] for indirect support¹⁰ of its position undercut CBE's position. WEPCO v. Reilly, 893 F.2d 901, 916 (7th Cir. 1990) (source can have potential to emit in absence of any operations); Puerto Rican Cement Co. v. EPA, 889 F.2d 292, 297 (1st Cir. 1989) (same). The Court finds that under the "potential to emit" standard in Rule 2005(d), CBE is incorrect that the facility's emissions baseline was zero prior to alterations or modifications.

c. Summary: Alterations

In sum, CBE has failed to demonstrate as a matter of law that alterations to some of the Refinery equipment voided the facility permit or require the application of NSR to the facility as a whole under Rule 209. CBE's contentions would require NSR every time a refiner subjected equipment to routine maintenance or to improvements. Such disincentives to capital improvements would hardly achieve the objectives of the CAA.

[**32] [*1142] 3. The Six-Year Shutdown of the Facility, in Conjunction with Refinery Modifications, Triggers New Source Review Under the Clean Air Act

CBE asserts that under both Rule 209 and the EPA's "Reactivation Policy," the Refinery was permanently shutdown and modified such that New Source Review applies. The thrust of CBE's argument is that because Powerine indicated an intent to permanently shutdown the Refinery, because the Refinery was then in fact shutdown for six years with no emissions, and because the Refinery will utilize different equipment and refine a different product ("reformulated gasoline") than the old facility, the Clean Air Act compels treating the Cenco Refinery as a new source, subject to the emissions requirements of the CAA's NSR program.

a. CBE Has Made a Strong Showing That Rule 209 Voids Permits for Equipment That Has Been Permanently Shutdown

Rule 209 states that "when equipment which has been granted a permit ... no longer will be operated by the permittee, the permit shall become void." CBE asserts that Defendants violated the plain language of the Rule "because Powerine informed SCAQMD that it would no longer operate the Facility." Motion, p.9.

Defendants [**33] respond that the quoted language of Rule 209 does not void permits upon the suspension of operations, but merely voids permits the equipment for which will be operated by a new owner when no change of ownership application has been filed. In other words, Defendants assert that the "no longer will be operated by the permittee" language merely explains what happens to permits (they are voided) when unauthorized transfers are attempted; it does not add an additional ground (suspension of operations) for voiding permits. In support, defendants assert that:

CBE's interpretation would have the effect of severely punishing a business that runs into financial trouble and must cease operating temporarily. Under CBE's view, such a facility would lose its permit to operate and could not reopen without incurring the expense and delay of NSR.

Opposition, p.12.

However, CBE counters that under its reading of Rule 209 not every suspension of operations necessarily voids a permit; instead, only a "shutdown" with the intent to *shutdown permanently* voids a permit under the "no longer will be operated by the permittee" language of Rule 209. This interpretation of the Rule is consistent [**34] with its language, is consistent with the EPA's Reactivation Policy, does not trigger the adverse consequences suggested by Defendants because it would not apply to clearly temporary operations suspen-

¹⁰ CBE asserts that "EPA regulations confirm that the Refinery is a new source." Reply, p.9.

sions, and addresses the practical concern that a long shutdown facility or one intended to be permanently closed presumptively should be subject to stringent emissions review upon its later resurrection.

Defendants assert that Rule 301 is inconsistent with CBE's interpretation of Rule 209 because Rule 301 allows reinstatement of permits that have expired due to non-payment of fees. This is incorrect. Subsection 301(d)(7), discussed *supra*, provides that reinstatement is allowed only "if such reinstatement request is made within 24 months of the date of operation." The Rule in fact supports CBE's position that Rule 209 voids permits for equipment that an owner has indicated he is permanently shutting down because it states that after a certain period of non-operation and non-payment of fees, equipment permits cannot be reactivated; reinstatements [*1143] are permissible *only* within a 24 month period.

At this point, the Court declines to rule that as a matter of law, either CBE's or Defendants' [*35] interpretation is correct. The statutory language and the record before the Court do not compel either result. However, the Court finds that CBE has at least made a showing of likelihood of success: CBE may very well demonstrate that Rule 209, quite sensibly, voids permits for equipment that has been shutdown or abandoned.

b. CBE Has Made a Strong Showing That the Factors in EPA's Reactivation Policy (Concerning the Application of NSR to Permanently Shutdown Facilities) May Be Taken into Account In Interpreting the Clean Air Act

Defendants do not dispute that the EPA has a 20-year-old policy of subjecting pollution sources that were permanently shutdown to New Source Review if those sources are restarted. See *In the matter of Monroe Electric*

Generating Plant Entergy Louisiana, Inc., Proposed Operating Permit, Petition No. 6-99-2. "Order Partially Granting and Partially Denying Petition for Objection to Permit," dated June 11, 1999. Defendants also admit that SCAQMD in fact applied the Reactivation Policy criteria to the Cenco facility. See Mueller Decl. 8. Nevertheless, defendants assert that the EPA Policy is unenforceable because it was not properly promulgated and [*36] is not a reasonable interpretation of the Clean Air Act subject to this Court's deference.

Defendants correctly assert that if the Policy imposes new substantive obligations above and beyond or different from those in the Clean Air Act, it is a "legislative rule" subject to notice and comment procedures under the Administrative Procedures Act. Opposition, p.27. It is undisputed that the Reactivation Policy was not subjected to notice and comment.

Defendants next assert that the Policy adds or changes obligations because 1) the CAA limits NSR to construction of new or modified facilities and EPA regulations "specifically exempt activities such as resumption of refining activities ... from the definition of 'modifications' subject to NSR," Opposition, p.27: and 2) "there is absolutely nothing in the Act or regulations which would suggest that interruptions in the operations of existing, permitted sources trigger NSR," Opposition, p.28.

However, CBE makes a strong showing that the Reactivation Policy is a reasonable interpretation of Clean Air Act regulations that does not conflict with any terms of the NSR Program. NSR regulations indicate that for a long-dormant facility (at least [*37] those shutdown for two years or more), the emissions baseline for determining whether it has undergone an emissions increase subject to NSR will be zero.¹¹ [*1144] Therefore, such a facility is subject to NSR upon restart, assuming

¹¹ See 40 C.F.R. §§ 51.165(a)(1)(vi)(A)(1), 51.165(b)(3)(1)(a) (NSR triggered by increase in "actual emissions"); 40 C.F.R. §§ 51.165(a)(1)(xii)(B), 51.165(b)(2)(ii) ("In general, actual emissions as of a particular date shall equal the average rate ... at which the unit actually emitted the pollutant during the two year period which precedes the particular date [the date of change] and which is representative of normal source operations"); 57 Fed. Reg. 32314, 32325 (July 21, 1992) (rejecting that EPA should consider a two year period within the last five years of a plant's operation as the representative period for plants that have been shutdown for more than five years); *In the matter of Monroe Electric Generating Plant Entergy Louisiana, Inc., Proposed Operat-*

the requisite increase in emissions over the zero baseline.

[**38] Although Defendants assert that the Policy applying NSR to permanent shutdowns conflicts with 40 C.F.R. §§ 51.165(a)(1)(v)(C)(6), that regulatory subsection states merely that *HN2* "increase[s] in hours of operation or in the production rate," alone, do not constitute "modifications" subject to NSR. This provision is not inconsistent with finding that here, under the Reactivation Policy, 1) there is not a mere variation in the hours of operation but a fundamental change in the facility's operational status, from six years of non-operation to full operations and 2) the re-start will be accompanied by independent physical modifications to the Refinery triggering a comparison of new emissions to the zero baseline.

The Court finds on these bases that CBE has made a persuasive showing that the Reactivation Policy is a permissible and reasonable standard to apply in interpreting the Clean Air Act. Although the parties dispute whether EPA's interpretation is entitled to "deference" or "respect," no one contends that the Court must ignore a federal regulatory agency's reasonable analysis of its own regulations.¹²

[**39] c. CBE Has Made a Strong Showing That the Refinery Was Permanently Shutdown Under Rule 209

The Court also finds that CBE has demonstrated that it is likely to succeed on the issue of whether the Refinery would "no longer be operated" or was "permanently shutdown."

The SIP does not expressly describe what factors are important to an analysis of whether a facility would no longer be operated by the permittee. However, the EPA's Reactivation

Policy, which requires the application of NSR to facilities that have been "permanently shutdown" and thus addresses the same concern embodied in the "no longer will be operated" clause of Rule 209, does lay out a series of factors to be considered. The Court finds these factors apt and analyzes the Cenco refinery in their light, as well as the parties' contentions.

Under the Reactivation Policy,

EPA has examined factors such as the amount of time the facility has been out of operation, the reason for the shutdown, statements by the owner or operator regarding intent, cost and time required to reactivate the facility, status of permits, and ongoing maintenance and inspections that have been conducted during shutdown ...

[**40] *In the matter of Monroe Electric Generating Plant Energy Louisiana, Inc., Proposed Operating Permit*, Petition No. 6-99-2, p. 9-11, dated June 11, 1999.

i. Two Years or More of Non-operation

CBE asserts that the Refinery must be presumed permanently shutdown because [***1145**] it was not operational for not just two but six years. Defendants respond merely that "various operations have been conducted at the facility virtually throughout the time period in question." Opposition, p.20. However it is undisputed that the facility has not refined crude oil since 1995. Moreover, Cenco appears to have made admissions that any activity at the facility was that of a "skeleton staff that oversees the maintenance of its assets, which consist of an oil refinery and related assets." Reply Request for Judicial Notice, Exh.4. Such main-

ing Permit, Petition No. 6-99-2, p. 15, dated June 11, 1999 (stating that EPA "has applied its discretion narrowly in assigning representative periods other than the two years immediately preceding the physical or operational change"). In light of these regulations focusing the calculation of emission baseline on actual emissions in the two years proceeding a change, "EPA has made clear that in calculating the net emissions increase for reactivation of long-dormant sources potentially subject to PSD, the source is considered to have zero emissions as its baseline." *Monroe*, at 16.

¹² In light of the Court's ruling that CBE has made a strong showing that the criteria set out in the Reactivation Policy may be taken into account and are a reasonable interpretation of the CAA, and SCAQMD's admission that it in fact applied the Reactivation Policy Criteria to the Cenco refinery, the Court rejects Defendants' argument that they did not have "fair notice" of the Policy.

tenance-oriented activities are not sufficient to contradict that the Refinery did not operate for five years.

ii. Reason for Shutdown

CBE contends that the Refinery shutdown for economic reasons and that such shutdowns are "generally considered 'permanent' under the reactivation policy." Motion, p.18. However, although in some instances that EPA has found facilities [**41] that had shutdown for economic reasons permanently shutdown, the economic reasons appeared to be incidental to the decisions. It appears that under the Reactivation Policy, an economic reason for shutdown, standing alone, does not militate in favor of finding one way or the other.

iii. Intent and Plans to Restart

CBE quotes *Monroe Electric*, at 10-11, for the proposition that where a facility has been shutdown for over two years, owners and operators "must continuously demonstrate concrete plans to restart the facility sometime in the reasonably foreseeable future. If they cannot make such a demonstration, it suggests that for at least some period of the shutdown, the shutdown was intended to be permanent." As CBE points out -

. In June 1995, Powerine wrote SCAQMD that it would be shutting down its refinery beginning the first week in July, 1995. PSUF at 8. Powerine suspended all refining operations on July 3, 1995 and has not refined crude oil since that date. *Id.* at 9.

. In October 1995, Powerine informed SCAQMD that it was "in the process of shutting down the refinery for its ultimate dismantling" and that Powerine's new parent company planned to dismantle the refinery. [**42] *Id.* at 12-13. Also in October 1995, Powerine applied to SCAQMD to obtain Emission Reduction Credits. *Id.* at 14. Moreover, Powerine repeatedly requested suspension of regulatory reporting requirements due to the refinery having suspended operations. *Id.* at 41.

Defendants respond that Powerine repeatedly expressed its intent to resume crude oil refin-

ing both to SCAQMD and to other entities. For example,

. In December 1995, Powerine informed various state entities, including the Los Angeles Regional Water Quality Control Board, that the refinery might be resuming crude oil processing. DAMF 60. It informed the Regional Water Quality Control Board that Powerine was negotiating with a prospective buyer who "planned to bring the refinery back in operation, and rehire the majority of 350 laid off employees" and "desired to purchase the refinery equipment back from Kenyen Projects Ltd, the firm which purchased the refinery equipment and had been making plans to dismantle the refinery equipment and transport it to India." Christman Decl., Exh.16.

. Powerine wrote numerous letters to SCAQMD from January 1996 to January 1998 explaining that it sought to keep open the possibility of restarting [**43] the facility. *See* January 10, 1996 letter, Christman Decl., Exh.17 (seeking extension from Fee [**1146] Review Committee "to enable Powerine to pursue an option that may result in a restart of refining operations").

Although Powerine repeatedly attempted to secure the option of resuming refining, it does appear that there was at least one period during which the shutdown was intended to be permanent - the period between September 1995 when Powerine contracted with Kenyen and December 1995 when Powerine informed a state agency that it was negotiating with a buyer who sought to potentially resume refining operations. This would appear to negate any showing by Defendants that Powerine *continuously* planned to restart the facility. Defendants' evidence that Powerine management was not happy with the deal its parent Castle had cut with Kenyen is insufficient to show that Powerine had an intent to reopen the facility and con-

crete plans to do so at the time.¹³ Moreover, it is not clear that Powerine had "definite plans to restart" the facility or an "expectation to use" the facility "in the foreseeable future" throughout the shutdown period. *See Monroe Electric* at 19, 20. Defendants [**44] proffer a declaration from a Cenco V.P. and former Powerine C.F.O. that "Powerine made extensive efforts to obtain financing in order to resume crude oil refining during the 1995 to 1998 time period" and "held discussions with numerous entities regarding financing for crude oil refining operations." However, this hardly establishes definite plans to restart the facility in the foreseeable future.

Under the literal language of *Monroe*, Defendants carry the burden of showing continuous intent to reopen and definite plans to restart in the foreseeable future. The Court finds that although Defendants have raised a triable issue as to their intent, CBE is likely to succeed on the merits.

iv. Cost and Time Required to Reactivate

Although the parties dispute the exact numbers, it is clear that [**45] reactivation costs will equal between \$ 28 million and \$ 180 million. That huge disparity results primarily from the fact that Cenco is not only resuming refining operations but is making many "non-essential" upgrades to the facility as well. Defendants assert that mere "turnaround costs" are \$ 28 million, while the total cost including all upgrades is much higher.

There is also a large disparity between the estimates for time to reactivate the facility. CBE estimates 18 months while Defendants estimate six months.

Even accepting Defendants estimates, the numbers are higher than in other cases where the EPA found facilities permanently shutdown. Motion, p.18-19. Nevertheless, Defendants prof-

fer evidence that turnarounds, like the one here, are routine every three to five years in the industry. Christman Decl. 19.

Overall, the cost and time for reactivation factor slightly favors finding a permanent shutdown.

v. Status of Permits

Although CBE points out that Powerine allowed its facility permit to expire in 1998, Powerine did so with the express understanding that the permit could be reinstated within a year if fees were paid. Powerine reinstated the permits within six [*1147] months. [**46] Christman Decl. 18. Moreover, Powerine kept its other permits up to date throughout the period of suspension of operations.¹⁴ *Id.* at 11, 14, 15. This factor favors finding no permanent shutdown.

vi. Ongoing Maintenance and Inspections

It is undisputed that around two dozen employees have worked at the refinery since 1995 to maintain equipment. DAMF 68. This factor supports finding no permanent shutdown.

vii. Summary

CBE's strongest point is that Defendants have not shown that Powerine had a continuous intent and concrete plans to restart the facility. Although it is a matter of some factual dispute, it does appear that for at least some short period of time, Powerine intended to shutdown and dismantle the facility, not restart it. *Monroe Electric* indicates that this is fatal. On this basis, CBE may have demonstrated at least a likelihood [**47] of success on the merits of the Reactivation Policy, but not enough to warrant summary judgment, given the disputes about not only the facts but the permissible or

¹³ Equally insufficient, standing alone, is defendants' evidence and argument that the Kenyen deal was contingent on financing and that Powerine management doubted that Kenyen would be able to go through with the deal.

¹⁴ As Defendants pointed out at the hearing, SCAQMD maintained the Refinery on its emissions inventory. This too militates in favor of finding no permanent shutdown.

necessary inferences from facts.¹⁵

[**48] 4. Miscellaneous SIP Provisions

CBE asserts that Defendants violated several other SIP provisions: Rule 2005(c)(2) requiring that a facility hold sufficient RECLAIM trading credits to offset facility emissions for the first year of operation (FAC Fifth Cause of Action); Rule 201 prohibiting construction without first complying with NSR (FAC Seventh Cause of Action); Rule 210 prohibiting submission of incomplete or inaccurate information - here, failure to submit materials required by NSR - to SCAQMD (FAC Seventh Cause of Action); and Rule 212 requiring a 30 day Public Comment period for grants of permits (FAC Second Cause of Action).

Defendants' only persuasive defense to these claims is that if CBE loses on its NSR claims, then it loses on these claims as well. But because this Court has found that CBE has shown a likelihood of successfully showing that NSR applies to the facility, the Court finds that it has also shown a likelihood of successfully showing that Defendants violated these SIP provisions.

[*1148] B. Relief

The Court finds that although CBE has not demonstrated an entitlement to summary adjudication of any of its claims, it has shown a likelihood of success on [**49] the merits, for the reasons above.

CBE has also made a showing of irreparable harm. It is undisputed that *HN3* "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least long of duration, i.e.,

irreparable." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987). Here, Defendants admit that compliance with NSR and installation of BACT on every emissions source would lower the Refinery's emissions of air pollutants. PSUF 127-128.

Moreover, *HN4* when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment. See *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988). Although Defendants assert, without evidence, that there is a gasoline shortage and that the Cenco Refinery will help reduce it, the Court finds the public interest favors enforcing the Clean Air Act and protecting the environment.

Although CBE has not made a showing that environmental harm is immediate, CBE has demonstrated that NSR should have been applied to the facility and that permits [**50] have already issued allowing construction on and operation of the Refinery. Under these circumstances, the Court finds that an injunction preliminarily precluding Defendants from performing the permitted construction on or operation of the Refinery without applying NSR is warranted.

The Court has not received any proposed order from CBE detailing all aspects of the proposed preliminary injunction. CBE is therefore Ordered to do so by not later than seven calendar days from the date of this order. The terms of the injunction should be consistent with CBE's request for relief at pages 2-3 of its opening motion.

Although CBE cites some authority approving of waiving the bond requirement in environmen-

¹⁵ The Court acknowledges that at least on the surface there could be a tension between the analysis in section A.2.ii concerning the proper baseline for emissions under Rule 2005(c) and the conclusion in this section. The tension is only apparent, however, not real. Rule 2005(c) and (d), calling for a comparison of a facility's pre-modification and post-modification "potential to emit," apply to "Requirements for Existing Reclaim Facilities," and modifications to those existing facilities. In section A.2.ii, the Court addressed CBE's contention that mere alterations, putting aside the facility's shutdown, necessitated NSR. However, in section A.3 of this Order, the Court finds that CBE has shown a likelihood of demonstrating that the Facility needs to be treated as new because it was intended to be permanently shutdown under Rule 209. Therefore, the restarted facility's emissions should be compared to a baseline reflecting the pre-restarted facility's non-existent actual emissions during its six years of shutdown. (Footnote 11 of this Order discusses regulations calling for the comparison of a facility's actual emissions). Defendants do not dispute that under the Clean Air Act, NSR applies to the Refinery if it is deemed a new facility with an emissions baseline of zero.

tal citizen suits, *People ex rel Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir.1985), the Court is not persuaded that a bond would be inappropriate in this case. Therefore, Defendants are ordered to present the Court with documentation as to what would constitute an appropriate bond, taking into account the apparent non-commercial, non-profit status of CBE, by not later than five calendar days from their receipt of CBE's proposed order.

[**51] IV. CONCLUSION

For the reasons set forth above and good cause appearing therefor, the Court DENIES CBE's motion for summary adjudication and a permanent injunction and GRANTS CBE's motion for a preliminary injunction.

IT IS SO ORDERED.

DATE: September 26, 2001

A. Howard Matx

United States District Judge

Exhibit 2